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No. 2404.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MAURY I. DIGGS,
Plaintiff in Error.

vs.

THE UNITED STATES OF
AMERICA,
Defendant in Error.

**OPENING BRIEF ON BEHALF OF
PLAINTIFF IN ERROR**

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Filed this.....day of October, 1914.

FRANK D. MONCKTON, *Clerk.*

By.....

OCT 26 1914

Deputy Clerk.

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STATEMENT OF THE CASE.

The plaintiff in error, Maury I. Diggs, was indicted and convicted in the District Court of the United States, in and for the Northern District of California, for a violation of the Act of Congress of June 25, 1910, (36 Stat., 825) designated, in section 8 of the Act, as the "White-slave traffic Act."

The indictment contained six counts. After a trial lasting several days, the plaintiff in error (hereinafter designated as the defendant) was convicted on the first four counts of the indictment. No verdict was rendered on the last two counts, which, in law, amounts to an acquittal upon those counts. A conviction and judgment upon one of several counts, *with no verdict upon the others*, is an acquittal on the other counts.

CYC. Vol. 12, p. 695;

Jolly v. U. S. 170 U. S. 402, 42 L. Ed. 1085;

Dealy v. U. S. 152 U. S. 539; 38 L. Ed. 545.

The defendant was sentenced to imprisonment in the Federal penitentiary at McNeil's Island, State of Washington, for the term of two years and fined in the sum of \$2000.00. From the judgment of conviction, he prosecutes this writ of error.

The indictment contains six counts. The first charges the defendant with transporting Marsha Warrington from Sacramento to Reno for the purpose of debauchery and an immoral purpose, to-wit, that the aforesaid Marsha Warrington should be and become the concubine and mistress of said defendant.

The second count charges that the defendant transported Lola Norris from Sacramento to Reno that she might become the mistress and concubine of F. Drew Caminetti.

The third count charges that the defendant procured a ticket for Marsha Warrington from Sacramento to Reno with the intent that she should become his concubine and mistress.

The fourth count made a similar charge as to buying a ticket for Lola Norris, with the intent that she should give herself up to debauchery and for an immoral purpose, to-wit, that she should be and become the concubine and mistress of one F. Drew Caminetti.

The fifth count charged that the defendant persuaded, induced and enticed Marsha Warrington to go from Sacramento to Reno for the purpose of debauchery and for an immoral purpose, to-wit, that she should be and become the concubine and mistress of the defendant.

The sixth count charged the defendant with persuading and enticing Lola Norris to go to Reno for the purpose of being and becoming the concubine and mistress of F. Drew Caminetti.

The defendant was convicted on the first four counts. It should be explained that, while the defendant was convicted on four counts of

the indictment, he was found guilty of but two offenses; one, contained in counts one and three, with having furnished transportation—procured a ticket—for Marsha Warrington; and the other, counts two and four, with having furnished transportation—procured a ticket—for Lola Norris. A mere reading of the first four counts of the indictment, in connection with the evidence contained in the bill of exceptions, will show this to be the fact.

While not appearing in the record, yet it was a matter of such general information, that the Court will probably take judicial notice of the fact, that the trial took place at a time of great excitement manufactured by the press and increased for political purposes. It had been vehemently asserted that this defendant and Caminetti were pursuing a systematic course of taking young innocent school girls, against their will, and placing them in houses of prostitution and living off their earnings, and it was said in the press that these young men had houses in Reno, Salt Lake City, and elsewhere, that were filled with their victims, and that they intended Marsha Warrington and Lola Norris for a similar fate. It was said that the girls bravely resisted their spoliation but were overcome by brute force. Even

in the trial of the case, as the Court will see by the record, the prosecution introduced a bloody sheet with much dramatic effect for the purpose of showing to the eyes of the jury how the young woman (Lola Norris) had fought like a tigress to preserve her virtue, and then, after this evidence had produced its effect, withdrew it, because it appeared that the blood was simply caused by a natural event incident monthly to females.

It so happened, as the Court must know, as a matter of general knowledge, that the father of young Caminetti had just been appointed to a position at Washington, taking office May 1, 1913. The cases would, in orderly course, come along for trial some time in July or August of that year, and, quite naturally, the father desired to be present at the trial of his son. He tried to get a leave of absence but, as he had just taken office, his services were required there until he could get his office in running order, and his chief said he would ask the Attorney General to request the United States Attorney at San Francisco to let the trial be postponed until autumn, when the elder Caminetti could get away from Washington. When this request was communicated to the United States Attorney, who was of a different polit-

ical faith from the administration at Washington, he sent inflammatory dispatches to the President, which of course, the press published in full and every one who was against the administration saw a chance to make some political capital against the party in power.

As stated, while all these facts, strictly speaking, do not appear of record, still they were so prominently brought before the public through the daily press and other sources apparently of an authoritative nature, that we feel justified in alluding to them in this preliminary statement of the case.

The condition in the case at bar may be somewhat likened to that which existed in the case of *People v. Becker*, Vol. 104 N. E. Rep. p. 396, 399, where the Court of Appeals of New York said, speaking through Mr. Justice Hiscock: "I think the record and events of which we may take judicial notice permit it to be stated that this public interest and excitement were sustained and stimulated by daily newspaper reports, apparently emanating from authoritative sources."

FACTS.

The defendant, the evidence shows, was a young man twenty-six years of age, practicing his profession of architect at Sacramento.

F. Drew Caminetti was two years younger and was a clerk in the State Capitol. Marsha Warrington was a stenographer working in Sacramento. Lola Norris was a clerk employed in the State Library at Sacramento. Marsha Warrington was introduced under an assumed name on the streets of Sacramento to Diggs. She was introduced to him by a saloon-keeper named Monty Austin. This saloon-keeper owned a half interest in a saloon in Sacramento, but before the trial disposed of his interest, left the State and was out of the State at the time of the trial. Immediately upon her introduction under these circumstances, Marsha Warrington jumped into the automobile that Diggs was then driving and, with this Monty Austin, went out for a ride visiting some of the road houses.

Lola Norris and Marsha Warrington were chums. These two, with the two young men, went out together on automobile trips, visiting road houses, drinking, etc.

The evidence discloses that a month before the trip to Reno all four went on an automobile trip to San Francisco. Diggs and Marsha Warrington registered as man and wife at the Grand Hotel in that city under an assumed name and occupied a room together all night.

She testified they had sexual intercourse. The next day they went to San Jose and registered as man and wife at the Hotel Montgomery, occupying a room all night. Lola Norris and Caminetti also, at the same time, registered under assumed names as man and wife at the Grand Hotel, San Francisco, and the Hotel Montgomery, San Jose, occupying rooms all night. While the party was at San Jose, Marsha Warrington telephoned to her mother, giving a false excuse as to their absence.

Without going into details, it will suffice to say that the defendant and Marsha Warrington had been running around together for several months prior to the trip to Reno. Both Diggs and Caminetti were married. Marsha Warrington knew Mrs. Diggs and had been entertained at their home. Diggs and Caminetti were introduced by the girls to their families under assumed names. Their conduct became such a scandal in Sacramento that it reached the ears of the wives of Caminetti and Diggs. Mrs. Diggs wrote to the father of Diggs at Berkeley, telling him what she had heard of the doings of his son and her husband. She at that time did not know the names of the young women, but had heard that her husband was running around with a young woman.

Upon receiving this information, the father of defendant telephoned to defendant that he was going to take his automobile away from him, and finally came to Sacramento, trying to find his son to make him give up his liaison with Marsha Warrington. He went to the saloon kept by Monty Austin and threatened to have defendant and Marsha Warrington arrested, to bring them before the juvenile court and to have the defendant held by the court and Marsha Warrington sent to a reform school. In the meantime Mrs. Caminetti, wife of Drew Caminetti, told her husband that she was going to bring him and the young women before the juvenile court of Sacramento County. Diggs' father also told Caminetti that he was going to place the whole crowd in jail. Diggs, father remained for several days in Sacramento, trying to find his son, the defendant, but the latter took a room at the Columbia Hotel at Sacramento where he was visited by Caminetti and the young women. The women had been told that a reporter on one of the local papers had written up the story of their escapades and was about to publish it. Defendant's father returned to his home at Berkeley, leaving word that he would return the following Monday to have the young women arrested.

The defendant had his office in what is known as the Diepenbroek Building in Sacramento. The owner of this building had heard that the juvenile court was about to cause the arrest of the defendant and the women for their conduct in Sacramento, and communicated this information to the defendant.

During this week preceding the trip to Reno, the defendant was hiding in the Columbia Hotel at Sacramento, so as to escape the wrath of his father who had come from Berkeley to Sacramento to break up the relations that existed between his son and Marsha Warrington, and, if necessary, to have them arrested for their conduct, and all four were harassed and worried because their guilty love had been discovered. It appeared to all that exposure was to follow and not only that, but the men were likely to be put upon probation and the young women sent to a reform school.

In their consternation and mental worry, the best thing, it seemed to them and to all of them, was to leave Sacramento until the affair blew over. They intended, at first, to go to Los Angeles, but, owing to the time of leaving of the trains, this was inconvenient, and, as the next train going to any distance was the train going to Reno, they decided to take that. There were two trains going that night. They

were unable to take the first, and the last train leaving Sacramento reached Reno the next day. They occupied the same stateroom on the train, the defendant and Marsha Warrington the lower berth, and Caminetti and Lola Norris the upper berth. When they reached Reno they went to the public hotel and took rooms under assumed names, living as man and wife, and finally rented a bungalow in which they were found when arrested.

The young women went voluntarily. While at Reno they were all happy together, as testified to by the Chief of Police. Of course, their disappearance from Sacramento caused a sensation. The fathers of the women applied for warrants in the state courts. They waived extradition and came back to Sacramento voluntarily. While the defendant and Caminetti were at Sacramento on the warrants issued by the state court, a cry was raised that they could be prosecuted under the "White Slave Act." Complaints were sworn to against them in San Francisco. They waived preliminary examination and a separate indictment was filed against the defendant for six violations of the "White slave traffic Act," upon which he was tried and convicted on four counts of the indictment.

From this brief statement of facts which appear more fully in the bill of exceptions it is apparent:

1. There was no element of gain or commerce in the affair.

2. The man and woman went voluntarily from Sacramento to Reno.

3. They did not go there as charged in the indictment, that the woman should be the concubine of the man or for the purpose of debauchery.

4. Any immorality that existed had its beginning in California.

5. They did not go from Sacramento to Reno for any of the purposes specified in the "White slave traffic Act," but for an entirely different purpose. If immorality was indulged in, it was not the purpose of the trip.

6. The purpose of the young women, in going to Reno, was to escape the notoriety of exposure and arrest, and also imprisonment for their misconduct at Sacramento.

7. If the "White slave traffic Act" is applicable to this case, it is applicable to a case where a man is living with a woman in California without being married and takes her along with him on a business trip outside of the state.

We are satisfied that, owing to the errors committed by the trial court in admitting evidence to the injury of the defendant, to errors in granting and refusing instructions, and to the misconduct of the counsel for the Government, a new trial will have to be granted. Should the Court grant a new trial, it may be unnecessary to consider the other points that we urge as to the proper interpretation of the statute under which the defendant was convicted, and as to the requirement that some element of commercial vice must appear to justify a conviction.

For that reason, we shall argue, first, the points which, in our judgment, necessitate the granting of a new trial, and then revert to the proper interpretation of the statute sometimes called the "Mann Act," and popularly and officially designated as the "White-slave traffic Act."

ARGUMENT.

I.

THE TRIAL COURT ERRED IN CHARGING THE JURY TO THE EFFECT THAT IF HE (DEFENDANT) HAS "FAILED TO DENY OR EXPLAIN ACTS OF AN INCRIMINATING NATURE, THAT THE EVIDENCE OF THE PROSECUTION TENDS TO ESTABLISH AGAINST HIM, SUCH FAILURE MAY NOT ONLY BE COMMENTED UPON BUT MAY BE CONSIDERED BY THE JURY WITH ALL THE OTHER CIRCUMSTANCES IN REACHING THEIR CONCLUSION AS TO HIS GUILT OR INNOCENCE, SINCE IT IS A LEGITIMATE INFERENCE THAT COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM, HE WOULD HAVE DONE SO."

(Assignments of Error Nos. 161, 162; Transcript of Record, pp. 112-114, 264, 389, 390, 391.)

These instructions to the jury, to which counsel for defendant objected and excepted, operated to the most serious prejudice of de-

fendant, and constitutes, we respectfully submit, unquestioned ground for reversal.

It is to be noted, in this connection, that the attorneys for the prosecution committed similar errors in their arguments to the jury, in urging that the defendant, by his failure to explain or deny, while on the witness stand, had admitted this or that or some other fact. (See especially Assignment of Error No. 97; Transcript of Record, pp. 367, 368.)

The error of the prosecuting attorneys, in this regard, will be considered together with the errors of the trial Judge complained of by us in our Assignments of Error Nos. 161, 162.

That portion of the charge to the jury, containing the erroneous matters, is as follows:

“After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant’s privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. *But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration.* A defendant is not required under the law to take the witness-stand. He cannot be compelled to

testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and *if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; SINCE IT IS A LEGITIMATE INFERENCE THAT, COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM, HE WOULD HAVE DONE SO.*" (Transcript of Record, pp. 390-391.)

This charge to the jury constitutes very serious and reversible error, especially that portion set out in italics. The instructions themselves do not state a correct rule of law, and the giving of them were material and substantial errors.

As stated in the leading case of *Balliet v. United States*, 129 Fed. Rep. 689, 696:

"We are satisfied that the instruction cast an *undue burden on the defendant*, and that it was also *misleading*. Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that *the defendant was not prejudiced by the instruction*. The judgment below is accordingly *reversed*, and the case is remanded for a new trial." (Italics ours.)

This is a decision by the Circuit Court of Appeals for the Eighth Circuit, and the instruction in that case is substantially similar to the objectionable instructions given in the case at bar. It was as follows (at page 695):

“It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, *if he has not fully explained, or has not explained matters which are material to the issues in this case, and which are naturally within his knowledge,* you may consider that as a circumstance tending to show that the facts, if explained, etc., would bear out the contention of the government, and *his failure to explain them or give a truthful explanation is against him.*” (Italics ours.)

The Circuit Court of Appeals for the Eighth Circuit said, of this instruction:

“We have not been able to conclude that this instruction states a correct rule of law, or that the giving of it was not a material error. As we interpret this instruction, it means that, inasmuch as the defendant had elected to testify in his own favor, if while on the stand he had not fully explained all matters and things material to the issue in the case which the jury might think were naturally within his knowledge, then the jury might conclude that the facts, etc., if he had indulged in an explanation concerning them, would have borne out the contention of the government—that is, shown that he was guilty—and that his failure to explain was against him; that is, would justify a conclusion of guilt. This rule of law would put

the defendant in a criminal case in a peculiar attitude, for if he takes the stand as a witness he must perforce explain every fact and circumstance which has been put in evidence against him, as tending to establish guilt, which a jury may deem material, and such as he could explain, at the risk of having them conclude, because of his silence as respects such facts and circumstances, that they are true and that he is guilty. If a defendant in a criminal case desires to take the stand and contradict some particular fact or circumstance that has been testified to, he cannot safely do so for fear of raising a presumption of guilt by his failure to explain other facts and circumstances in evidence which the jury may happen to regard as material and may think the accused could explain. The federal statute (Act March 16, 1878, c. 37, 20 Stat. 30 [U. S. Comp. St. 1901, p. 660]) provides, in substance, that a person charged with an offense "shall at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." When the defendant in a criminal case, in compliance with this statute, waives his constitutional privilege by taking the witness stand, he occupies the attitude of any other witness, and may be cross examined like an ordinary witness, and to the same extent. *Fitzpatrick v. United States*, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078. The federal statute does not, like the statutes of some states (vide Rev. St. Mo. 1899, Sec. 2637), expressly provide that the examination of the accused shall be limited to the matters testified to on his direct examination, but we apprehend that it should be so limited, because that is the general rule which

obtains in the federal courts relative to the cross examination of all witnesses except, when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity. *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Wills v. Russell*, 100 U. S. 625, 626, 25 L. Ed. 607; *Montgomery v. Aetna Life Ins. Co.*, 38 C. C. A. 553, 97 Fed. 913; *Goddard v. Crefield Mills*, 21 C. C. A. 530, 75 Fed. 818; *Safter v. United States*, 31 C. C. A. 1, 87 Fed. 329. It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the government may comment on his testimony and draw inferences therefrom as freely as if he were an ordinary witness and not the accused. It is only where the accused fails to testify that the statute prohibits unfavorable comment and attempts to create a presumption against him because he has not done so. Conceding this much, we are nevertheless of opinion that the instruction in question went too far, in that it required the accused to explain every fact and circumstance which had been introduced against him, and gave to them additional probative force because he had not done so or attempted to do so. Furthermore, it left the jury at full liberty to determine what matters which had been given in evidence were "material to the issues in the case," without directions on that point, and equal liberty to determine what matters were "naturally within his knowledge" and susceptible of explanation. The testimony in the case had taken a very wide range and covered a considerable period of time. While on the stand some facts and circumstances that had been introduced in evidence may have been overlooked by the accused

or by his counsel, and he may not have been interrogated with respect thereto for that reason, or they may have been regarded as of no importance, or the circumstances may have been of a character which admitted of no further explanation, being in themselves such circumstances as the jury could ignore or draw such inferences therefrom as they thought proper. And yet the instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused, because in the course of his examination he had not alluded to every fact and circumstance already in evidence, and given an explanation thereof consistent with his innocence. *We are satisfied that the instruction cast an undue burden on the defendant, and that it was also misleading. Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that the defendant was not prejudiced by the instruction.*

“The judgment below is accordingly reversed, and the case is remanded for a new trial.” (Italics ours.)

In a concurring opinion, Circuit Judge Sanborn was even more forcible in his criticism of the instruction in that case and went further than the judges who delivered the majority opinion would go. The learned Judge said:

“I concur in the result, and in the opinion in this case, with this exception: The opinion contains the statement that it is the general rule in the federal courts relative to the examination of all witnesses, except when the rule is relaxed, as it sometimes is, on grounds of

convenience or necessity, that the cross examination must be limited to the matters testified to upon the direct examination of the witness. I concede the general rule, but I do not understand that it is discretionary with the federal courts to relax the rule, on the ground of convenience or necessity, so far as to permit a cross examiner to cross-examine a witness, produced by his opponent, upon subjects not germane to those upon which he was examined in chief. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.* (C. C. A.) 129 Fed. 668; *Houghton v. Jones*, 1 Wall, 702, 706, 17 L. Ed. 503; *Montgomery v. Aetna Life Ins. Co.* 97 Fed. 913, 916, 38 C. C. A. 553, 557; *Safter v. U. S.* 87 Fed. 329, 330, 31 C. C. A. 1, 2; *Mine & Smelter Supply Co. v. Parke & Lacy Co.* 107 Fed. 881, 884, 47 C. C. A. 34, 36; 1 *Greenleaf Ev. Sec.* 445; *Hopkinson v. Leeds*, 78 Pa. 396; *Fulton v. Bank*, 92 Pa. 112, 115. A rule which may be relaxed by the court when in its opinion it is necessary or is convenient to relax it is no rule at all. Such an exception is the abrogation of the rule because it leaves its controlling force and effect in every case to the discretion of the trial court. In my opinion the rule has not been so abrogated by the federal courts, and it ought not to be so destroyed. This rule rests upon a sound reason, which varies not, at the discretion of the court, by reason of convenience or necessity. It exists because a witness during his cross examination is the witness of the party who calls him, and not the witness of the party who cross examines. *Wilson v. Wagar*, 26 Mich. 452, 458; *Campau v. Dewey*, 9 Mich. 381. The cross examiner has the right to bind his opponent by the testimony of the witness upon cross examination relative

to every subject concerning which his opponent examined him in the direct examination. But he has no right to bind his opponent by the testimony of the witness during the cross examination upon subjects relative to which his opponent did not examine him. If he would examine the witness upon such subjects, he may and he must make him his own witness, and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross examiner to do this at the time he is conducting the cross examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But in the federal courts the line of demarcation which limits a rightful cross examination is clear and well defined. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands sponsor for the truth of his testimony, while without that line he does not. It does not vary with any convenience or necessity of court or counsel, because no convenience or necessity can be conceived of which would not enable the cross examiner to make the witness his own and take the chance of his testimony. For these reasons I adhere to the general rule upon this subject, but am unable to concede the correctness of the exception thereto stated in the opinion."

These able opinions of the Circuit Court of Appeals for the Eighth Circuit, in the case

of *Balliet v. United States*, are most convincing and are directly applicable to the case at bar. While the phraseology of the erroneous instruction in the case cited is somewhat different from those involved in the case at bar, still the instructions amount to substantially the same thing. In the case cited, the jury was instructed that “if he has *not fully explained*, or has *not explained matters which are material to the issue in this case*, and which are *naturally within his knowledge*, you may consider that as a *circumstance* tending to show” etc., “*AND HIS FAILURE TO EXPLAIN THEM OR GIVE A TRUTHFUL EXPLANATION IS AGAINST HIM*”; and, in the case at bar, the jury was instructed that “if he (defendant) has *failed to deny or explain acts of an incriminating nature*, that the *evidence of the prosecution tends to establish against him*, such *failure* may not only be *commented upon* but may be *considered* by the jury with all the *other circumstances in reaching their conclusion* as to his guilt or innocence; *SINCE IT IS A LEGITIMATE INFERENCE THAT, COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM, HE WOULD HAVE DONE SO.*”

Both of these instructions practically charged the jury that the failure of the accused to explain or deny was a circumstance indicative of guilt. Not only are such instructions *erroneous* but, as was pointed out in the case of *Balliet v. United States*, they are *misleading*. In the case cited, the instruction "left the jury at full liberty to determine what matters which had been given in evidence were 'material to the issues in the case,' without directions on that point, and equal liberty to determine what matters were 'naturally within his knowledge' and susceptible of explanation." In the instructions involved in the case at bar, the trial Judge made no attempt whatever to direct the jury as to what matters were "acts of an incriminating nature that the evidence of the prosecution tends to establish against him." This left the jury at full liberty to determine what were "acts of an incriminating nature that the evidence of the prosecution tends to establish against him."

The testimony in the case at bar had taken a wide range and covered a considerable period of time. The trial covered practically two weeks, consuming ten actual court days. About thirty witnesses were examined on both sides. The transcript of the testimony, excluding arguments of counsel and the charge of the

Court to the jury, amounted to 690 pages of typewritten matter. The trial Judge admitted a great deal of testimony for the purpose of throwing light upon the relations of the defendant with Marsha Warrington, and also upon the relations of F. Drew Caminetti with Lola Norris, for a considerable time previous to their departure from Sacramento on the trip to Reno. The trial Court permitted the prosecution to exploit very fully the occurrences attending the trip from Sacramento to Reno as well as what transpired after the arrival at Reno and during the occupancy of the quartet in the bungalow at Reno up to the time of their arrest by the California State authorities, and even after their arrest, down to the time of their return to Sacramento. It is inconceivable that the jury could have intelligently selected from this mass of evidence all those "acts of an incriminating nature that the evidence of the prosecution tends to establish against him," and which, it was claimed, he, the defendant, had failed to deny or explain, without some specific directions on the subject by the trial Judge, in connection with the giving of these particular instructions, of which the defendant now complains.

But, aside from the instructions being *misleading*, as above pointed out, they were radically *erroneous*. They were violative of the defendant's constitutional right not to be compelled to be a witness against himself; they were violative of the presumption of defendant's innocence; they were subversive of the doctrine of reasonable doubt, to which the defendant was entitled; they practically shifted and placed the burden of proof upon him; they placed an undue burden upon him; the jury was practically instructed that his failure to explain or deny matters, as to which it appears, however, he was not asked a single question either on direct or cross examination, was a circumstance indicative of guilt.

Article V of the Amendments to the Constitution of the United States expressly provides that:

“No person * * * shall be compelled in any criminal case to be a witness against himself.”

The Act of Congress of March 15, 1878 (20 Stat. at L. 30, Chap. 37) provides:

“That in the trial of all indictments, information, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.”

Boyd v. United States, 116 U. S. 616.

It is elementary and fundamental law of the land that a person accused of crime is presumed to be innocent.

Coffin v. United States, 156 U. S. 432;

Kirby v. United States, 174 U. S. 47.

The burden of proof is always upon the prosecution. This burden of proof never shifts in a criminal case. The issue is always single, and it relates, not to the defendant's *innocence*, but to his guilt.

Coffin v. United States, 156 U. S. 432;

McKnight v. United States, 115 Fed.

Rep. 972;

Balliet v. United States, 129 Fed. Rep.

689;

People v. McWhortar, 93 Mich. 641;

Baker v. State, 80 Wis. 421.

The prosecution may adduce evidence sufficient to establish guilt, but the defendant is not called upon to aid them. When the prosecution rests, the case must be made out. If then a conviction is not justified, the failure of the defendant further to weaken the already weak case of the prosecution will not strengthen it. The requirement that his guilt shall be established beyond a reasonable doubt, and that he shall be presumed innocent until

proven guilty, are safe-guards which our law has wisely thrown about every person charged with crime, *but they were each of them denied to the defendant in this case by the erroneous instructions above set out.*

In the United States Courts and in the Courts of some of the states, independently of statute, and especially in California, the right of cross examination is restricted to matters inquired of in chief.

12 CYC. 577, 578;

People v. McGunziel, 41 Cal. 429;

People v. Sanders, 114 Cal. 246;

State v. Elmer, 115 Mo. 401; 22 S. W. 369;

State v. Fairland, 121 Mo. 137;

State v. Baldsoer, 88 Iowa, 55;

Balliet v. United States, 129 Fed. 689;

United States v. Mullaney, 32 Fed. 370;

Sec. 13, Art. 1, Constitution of Cal.;

Sec. 1323 Penal Code of California.

In the case of United States v. Mullaney, just cited, Mr. Justice Brewer said: "Of course, cross-examination is, in the Federal Courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony."

Wherever this rule obtains, and this rule obtains in both the Federal and State courts in California, it is held that the defendant *waives no right and surrenders no presumption* in going upon the stand, except as to *matters testified to in chief*. As to these, he may be fully cross examined as any other witness may be. If he testifies falsely, or fails or refuses to answer proper questions put to him on cross-examination, he must bear the consequences. His manner upon the stand, his demeanor in answering questions, his hesitancy, his frankness, his failure to deny or explain matters as to which he is asked *proper* questions on cross-examination, these, and other matters going to his credibility, may undoubtedly be adverted to and commented upon by the attorneys for the prosecution as well as by his own counsel in their arguments to the jury. Where, however, he does *not go into a subject*, where he does *not testify at all as to a particular matter*, where he *leaves it as the prosecution left it*, the case as made against him derives no support from *his silence*. The fact, therefore, that defendant went upon the stand in this case did not justify the instructions complained of.

The rule is thus summarized in CYC., Vol. 12, pp. 577, 578:

“In those States where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross examination as to matters not touched upon in direct examination.*”

See also Cooley Const. Lim. (6th ed.),
384-386;

State v. Lurch, 12 Oregon 99;

State v. Graves, 95 Mo. 510;

People v. O'Brien, 66 Cal. 602;

Gale v. People, 26 Mich. 157;

Fitzpatrick v. U. S., 178 U. S. 304;

Balliet v. United States, 129 Fed. Rep.
689.

As to his examination and cross examination, the defendant stood as any other witness in the case, but he was still within the protection of the Constitution, and not required to furnish evidence against himself.

It is clear that the prosecuting attorneys had no right to interrogate defendant concerning anything not relevant to his examination in chief, and for the stronger reason, the trial Judge had no right to comment or instruct where the prosecutor could not inquire, and the jury should not have been directed to draw adverse inferences from a reserve which the law holds sacred against intrusion.

The instruction then, finds no excuse in the fact that the defendant took the witness stand, and, in addition to the objections already urged, there is the grave objection that it practically shifted and placed the burden of proof upon him and called upon him to exculpate himself. Stripped of its excusatory qualification and its repetitions, it charges baldly: "If the defendant has failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence;" in effect, instructing the jury that failure to explain or deny would bear out the contention of the Government and indicate the guilt of the defendant.

Failure to explain can be against any one only when there is an obligation to explain. To found an adverse presumption upon such failure is to impose an obligation to explain. The party is forced to testify. Though silent, he speaks in condemnation of himself. In this case the facts shown did not, as matter of law, prove the guilt. That remained a question of

fact to be determined in view of the inherent, natural tendency of the facts upon the one side, and against this was always to be considered, even though there was nothing more, the *presumption of defendant's innocence. This presumption was evidence in favor of the accused.*

Coffey v. U. S., 156 U. S. 432;

Kirby v. United States, 174 U. S. 47.

We deny that from defendant's silence on any particular matter or matters any presumption whatever was to be indulged against him. Had he not taken the stand at all, there would be no doubt as to this. But the Court assumed that, because he went upon the witness stand, he must fully deny or explain *every act of an incriminating nature, that the evidence of the prosecution tended to establish against him*, and if he did not, that this was to be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence. This was practically shifting the burden of proof on the defendant and was placing an undue burden on him, and was deeply prejudicial to his substantial rights.

It is to be observed, from the record, that the defendant answered every question put to

him on his examination in chief and in cross-examination which the Court permitted him to answer. He was not silent as to anything. They, presumably, examined him as far as they thought necessary, and if, by inadvertence, or oversight, or misconception of what was material, they omitted anything, no presumption should be indulged against him.

But the defendant, having the right to remain silent altogether and there being no presumption against him because of his silence, what was the consequence of his testifying at all? Simply this—he put himself in the position of a witness and *exposed himself to proper cross-examination*.

The leading case of *Fitzpatrick v. U. S.*, 173 U. S. 304, 44 L. Ed. 1078, 1083, clearly lays down this rule and points out the line of demarcation between matters upon which it is proper to cross examine a defendant and matters which it is not proper. It lays down the well-settled rule that the cross-examination of a defendant, like any other witness, is *limited to the matters inquired of on direct examination*, and that it is *only* in a case of a refusal by a defendant to answer a *proper question put upon cross-examination* that that is a *proper subject of comment to the jury*. The Supreme Court used the following language:

“Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has *a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness*, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a *cross-examination upon these facts*. The witness having sworn to an *alibi*, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy’s and Kennedy’s that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a *proper question put upon cross-examination has been held to be a proper subject of comment to the jury* (State v. Ober, 52 N. H. 459); and it is also held in a large number of cases that when an accused person takes the

stand in his own behalf, he is subject to impeachment like other witnesses. *If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State v. Lurch, 12 Or. 99, 6 Pac. 408, is authority for saying that this would be in error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. State v. Saunders, 14 Or. 300, 12 Pac. 441, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination."*

We shall have occasion, farther on in this Opening Brief, to refer at length to both the authorities of *State v. Lurch*, 12 Or. 99, 6 Pac. 408, and *State v. Saunders*, 14 Or. 300, 12 Pac. 441, cited approvingly by the Supreme Court of the United States in the case just referred to, of *Fitzpatrick v. United States*.

As has already been pointed out, in the United States Courts and in the courts of the State of California, the right of cross-examination is restricted to matters relevant to those inquired of in chief and, wherever this latter rule obtains, it is held that the defendant waives no right and surrenders no presumption in going upon the stand, except as to matters testified to in chief.

The instruction, in practical effect, put upon defendant the burden of proving his innocence of the charge against him, and more than this, it required him to vindicate himself against every imputation, however irrelevant, suggested by the testimony, whether by direction or indirection.

What is it that the defendant is called upon by this instruction to fully and truthfully deny or explain?

The instruction answers for itself: "Acts of an incriminating nature, that the evidence of the prosecution tends to establish against him."

The instruction, in effect, assumes that the evidence "tends to establish" acts of an incriminating nature. But it was for the jury to say whether there was any evidence or not tending to establish acts of an incriminating nature against him.

Furthermore, what were the "acts of an incriminating nature, that the evidence of the prosecution tended to establish against him?"

Here are qualifications or limitations without which the explanation called for would be wide as the realm of human knowledge.

Substantially everything in evidence, at least on the part of the prosecution, is assumed

to relate to "acts of an incriminating nature." The instruction specifies nothing within the record, as to what were the "acts of an incriminating nature that the evidence of the prosecution tended to establish against him," and it excluded nothing therein. Nothing contained in it, however incidentally brought in, but the jury may consider it, for the jury are not judges as to what constitutes materiality—that is for the Court—but the Court turned them adrift without chart or compass to guide them. They must accept everything in evidence as relevant and material to the issue.

In *Leonard v. Washington*, 2 Wash. Terr. 381, 7 Pac. 872, the jury were instructed "that the fact that defendant does not disprove circumstances proved before them will give additional weight to such circumstances that are proved, if the jury believe the defendant has the means of disproving them if they be false."

The Supreme Court of the Territory of Washington said, of this instruction given by the trial Court:

"This also is objected to as erroneous, and we deem the *objection sound*. It is assumed by this language that circumstances have been proved, whereas it is for the jury to say whether any have been proved or not. Moreover, by it the jury are charged that the defendant's *failure to disprove* will give addi-

tional weight to circumstances proved; whereas in truth the failure does not necessarily add weight to anything, but only brings into the case an additional circumstance of greater or less significance, namely,—the failure itself; which circumstance is to be received by the jury for whatever on the whole it is worth, and may or may not combine with the other circumstances in the case, adding its weight to theirs, so that they with it will weigh more than they would alone.

“As to any failure on the part of defendant himself to testify, we doubt whether the instruction is sufficiently qualified to the apprehension of the jury by another correct instruction, afterwards given, to the effect that the jury should draw no inference of guilt against the defendant from his failure to testify in his own behalf.

“The Code provides ‘that it should be the duty of the Court to instruct the jury that no inference of guilt *shall arise* against the accused, if the accused shall *fail* or *refuse* to testify as a witness in his or her own behalf.’ (Code of 1881, Sec. 1067.)

“We think that the spirit of this provision demands that the failure of the defendant to testify *as to any point* shall not operate to his disadvantage *in any branch or aspect of the case.*”

In the same case, Turner, Associate Justice, in a separate opinion, said:

“I agree that that instruction is error, but I think it is error because it directs the jury *to consider the failure of the accused to offer evidence in his defense*, for the purpose of

assisting them to remove a reasonable doubt of his guilt, when, under the law, he is in no case required to offer evidence until his guilt is established beyond a reasonable doubt. In other words, *I do not think the failure of an accused person to offer evidence can, in any case*, be considered by the jury as a circumstance to determine, or to assist in determining, his guilt."

If it is error to permit a prosecuting attorney to examine defendant, when upon the witness stand, upon matters not testified to by him in his evidence in chief, it is certainly equally erroneous for the prosecuting attorney to comment upon matters which could not properly be elicited upon such cross-examination, and, if that be so, it is equally highly improper for the trial judge to instruct the jury that they may take into consideration, in reaching their conclusion as to the guilt or innocence of the defendant, the fact that he has failed to deny or explain acts of an incriminating character, as to which he could not properly be interrogated on cross examination.

This proposition was lucidly stated by the Supreme Court of the State of Oregon in the case of *State v. Lurch*, 12 Oregon 99, 102. The Court there said:

"The Circuit Court, however, did commit error in permitting counsel for the State to examine the appellant, when upon the witness

stand, upon matters not testified to by him in his evidence in chief, and in requiring him to write his name and other names, as before suggested. The statute of the State, which allows the accused in such a case to be a witness, provides that when he offers his testimony as a witness in his own behalf, he shall be deemed to have given to the prosecution a right to cross examine him upon all facts to which he has testified, tending to his conviction or acquittal. (Laws 1880, pp. 28, 29.) But this does not compel him to be a witness against himself beyond such cross examination. The humane principle of the law, that a party shall not be compelled to be a witness against himself, otherwise remains in full force, and is as effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified, as it would be if he were to be called and made to testify at the instance of the State. The object and purpose of the statute referred to were to afford an opportunity to the accused to relate his account of the transaction in which he is alleged to be implicated, and it would be a great violation of good faith to permit the State to take advantage of his situation and change the trial into an inquisition. The cross examination in such case must be strictly confined to the facts testified to by the accused. The law throws around him in such case an immunity which ought to be sacredly maintained."

The Court, in closing its opinion, used the following significant language, which we deem peculiarly applicable to the case at bar:

“Where the error consists of an infraction of a constitutional guaranty in favor of personal liberty, such as the *compelling a party accused of a crime to be a witness against himself*, the law will *presume an injury*, and the Court will have no alternative but to adjudge accordingly. The judgment appealed from will therefore be reversed, and the case remanded for new trial.”

This is the authority referred to approvingly by the United States Supreme Court in the case of *Fitzpatrick v. United States*, *supra*.

The remarks of the Supreme Court of Michigan in the case of *Gale v. People*, 26 Mich. 156, 160, 161, forcibly illustrate our contention. The Court there said:

“Few men, however innocent, could safely go upon the stand to answer a criminal charge, if they must at their peril, be prepared to give satisfactory answers to questions regarding their whole former life, or if they decline to do so, have their triers informed that the information they declined to give, it was proper for the prosecution to call out, and that the refusal to respond to the questions justly subjected them to unfavorable inferences.”

The case of *State v. Graves*, 95 Mo. 510, is directly applicable and it was held that it is error to allow the prosecuting attorney, over the objections of the defendant and without rebuke from the Court, to comment upon what the defendant might have testified about, but did not, when on the witness stand.

During the course of an able opinion, the Supreme Court of Missouri said (at page 513 et seq.):

“The defendant offered himself as a witness and testified as follows: ‘I never received any bottle of medicine of Hub Wright; had nothing to do with it.’ This was the whole of his evidence. The prosecuting attorney in his closing argument was permitted by the Court without rebuke (although objection was made) to comment on the fact that defendant, when on the stand, could have told where he was on the night of the larceny, but failed to make any statement as to where he was. We are asked to reverse the judgment on this ground, and this brings up the question as to whether or not the prosecuting attorney, in commenting upon the evidence given by a defendant in a criminal case who testifies in his own behalf, is confined to what he swore to on his examination, or whether he may, in addition to making comments on what he swore to, also comment on what he might have sworn to, but did not swear to.

“By Revised Statutes, Section 1918, it is provided that a defendant criminally charged may testify in his own behalf and ‘shall be liable to cross examination as to any matter referred to in his examination in chief.’ By Section 1919, it is provided that ‘if the accused shall not avail himself or herself of his or her right to testify * * * it shall not be construed to affect the innocence or guilt of the accused, nor be referred to by any attorney in the cause, nor be considered by the Court or jury before whom the trial takes place.’

Under these statutory provisions it is clear that a defendant who offers himself as a witness cannot be cross examined except as to such matters as may be referred to by him in his examination in chief, and it would seem to follow necessarily from this, that the comments on his evidence should be confined to such matters as he testified about in his examination in chief and cross examination. If a cross examination is limited only to such matters as the witness testified to in chief, upon what principle can the right be maintained to comment in argument upon matters about which a cross examination under the statute would not have been allowed?

“The statute having conferred the right upon such a defendant when he takes the stand to testify only in regard to such matters as he may choose, this right of choice would in effect be taken away by a ruling which would justify comments to be made, and unfavorable inferences to be drawn from what he might have testified about, but about which he did not testify. Under this statute the defendant has two options, the first of which is that he may elect either to go on the stand or not, as a witness; and second, when he elects to go on the stand he may testify only to such matters as he may choose. It is clear that, under the statute, if he elects not to go on the stand, the fact that he did not testify at all could ‘neither be construed’ to affect his innocence or guilt, nor be referred to by any attorney in the case.

“If the statute forbids comment upon what he might have sworn to when he elects not to go on the stand, why does it not *in its essence and spirit*, when he elects to testify, also forbid

comment upon *what he might have sworn to while on the stand and which he elected*, as under the statute he had the right to do, *not to testify about?* * * * It has been held in a number of cases, that when a trial Court allows such a defendant to be cross examined as to matters not referred to, in his examination in chief, that such action would be reversible error. And if that would be reversible error, *why would it not be reversible error to allow comment to be made upon what would be reversible error if brought on cross examination?*

“In the present case the defendant only testified to the fact that he never ‘got any bottle of medicine from Hub Wright and had nothing to do with it.’ Now, if, on his cross-examination, he had been asked, ‘Where were you on the night this larceny was committed?’ and he had been required to answer over his objection, and had answered he was in Hermitage, or if he had been asked, ‘Were you at Cross Timbers on the night of the larceny?’ and he had answered that he was not, and the prosecuting attorney had or not commented on this evidence thus brought out, under our rules in the following cases, the judgment, if rendered against him, would have to be reversed: State v. Porter, 75 Mo. 171; State v. Douglass, 81 Mo. 231; State v. McLaughlin, 76 Mo. 320; State v. Patterson, 88 Mo. 88; State v. Chamberlain, 89 Mo. 129. In the case last cited it is said: ‘And it has been uniformly held that no questions can be asked the defendant on cross-examination except of the character designated by the statute. In this instance the questions propounded to the defendant were altogether beyond the confines

of the statute. This error must cause a reversal.'

"If it is reversible error to enquire on cross-examination, about a matter not referred to in the examination in chief, why is it not reversible error if the prosecuting attorney comment upon a matter concerning which, if the defendant had been required to testify, the judgment would be reversed? Any other ruling or construction of the statute would necessarily have the effect of compelling a defendant in a criminal case either to elect not to go on the stand at all as a witness, or if he elected to go on the stand, to compel him to testify fully in regard to all matters connected with the charge, even though he might thereby criminate himself.

"For the error committed in allowing the prosecuting attorney to comment without rebuke (after the attention of the Court had been called to it) as to what defendant might have testified about, but did not testify about, the judgment will be reversed and the cause remanded."

This authority is directly applicable to the situation in the case at bar for, as we have seen, it is the well settled rule in the Federal Courts and in the Courts of the State of California, that the right of cross-examination is restricted to matters inquired of in chief, and the Federal statute forbids any unfavorable inference to be drawn from the fact that a defendant elects not to take the witness stand and testify in his own behalf.

In the case of *State v. Saunders*, 14 Oregon, 300; 12 Pac. 441, 444, 445, it was held to be error to permit the accused to be asked on his cross-examination questions not relating to facts to which he had testified on his examination in chief with a view to discrediting him.

This is another case cited approvingly by the United States Supreme Court in the case of *Fitzgerald v. United States*, *supra*.

It follows that a prosecuting attorney should not be permitted to comment or draw unfavorable inferences because the defendant has failed to deny or explain matters as to which he properly could not be cross-examined, and of course, for the same potent reasons, the trial judge, in his charge to the jury, should not be permitted to comment upon the failure of the defendant to deny or explain matters, as to which he could not properly be cross-examined, or instruct the jury as did the trial Judge in the case at bar.

The case of *Williams v. United States*, 168 U. S. 509; 42 L. Ed. 509, is also in point. In that case the trial Judge had instructed the jury, among other things, to the following effect:

“Where probable proof is brought of a state of facts tending to criminate the accused,

the absence of evidence tending to a contrary conclusion may be considered, although this attitude of the case alone would not be entitled to much weight, because the burden of proof lies on the prosecution to make out the whole case by sufficient evidence; but when proof of inculpatory circumstances has been produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and to show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charges. Therefore, if in this case the defendant could have produced testimony explaining his several deposits in the San Francisco Savings Union and the Hibernia bank during the months of September, October, November and December, 1895, and has failed to produce such testimony, then you are at liberty to infer that any explanation in his power to make would have been, if made, adverse and prejudicial to the defense."

It will be noted that the above instruction is very similar to the objectionable instructions given in the case at bar. The Supreme Court of the United States held such an instruction to be erroneous and reversed the case, with directions to grant a new trial, saying:

"The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record

that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offense imputed to him. In our judgment the court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, *as well as what it said to the jury on that subject.*”

The Circuit Court of Appeals for the Sixth Circuit, in the case of McKnight v. United States, 115 Fed. Rep. 972, Circuit Judge (now Mr. Justice) Day delivering the opinion, entered very fully into the subject of the constitutional right of the defendant not to be compelled to be a witness or to furnish any incriminating evidence against himself and, in an elaborate discussion, shows how jealous the courts have been to protect a defendant from any illegitimate and unconstitutional practices subversive of this constitutional right and to prevent any comment whatever by prosecuting attorney or judge because of his failure to testify. The opinion is highly interesting upon the subject in general and its rationale directly applicable to the case at bar.

In the case of State v. Saunders, 12 Pac. Rep. 441, 444, 445, the following interesting and apposite observations were made. The language employed in this case is so illustrative and apposite, upon the proposition that

the cross-examination of a defendant should be limited to matters covered by the examination in chief, that we quote liberally:

“The statute of this state which permits a defendant in a criminal case to offer himself as a witness in his own behalf provides that the offer, when so made, shall be deemed to have given to the prosecution a right to cross-examine him upon all the facts to which he has testified tending to his conviction or acquittal. Laws 1880, pp. 28, 29. The question, therefore, is how far he subjects himself to cross-examination, under that statute. It is very likely that, if the statute contained no limitation as to the extent of the cross-examination of a defendant in such a case, he would occupy the same footing as any other witness, if he chose to take the stand, although some of the decisions from the states in which no limitation is imposed upon the cross-examination hold that the cross-examination of a defendant, in such a case, should not there be allowed the same latitude permitted in the cross-examination of a witness not a party defendant. The ground of the distinction was an apprehension that the defendant, in such case, might be convicted of one offense upon his admission that he had committed others. *People v. Brown*, 72 N. Y. 571. It seems to me that this distinction is very properly made, conceding that an ordinary witness may be interrogated upon his cross examination as to whether he has not committed other offenses that cannot affect him beyond his credit in the particular case, unless it expose him to prosecution, and then he can claim his privilege; but, as regards the party accused, such exam-

ination operates as a two-edged sword. It would not only impair his credit as a witness, but create a strong prejudice in the minds of the jury against him, and be a material aid towards convicting him. Unless, therefore, a defendant in a criminal prosecution is as pure as the icicles which form on Diana's temple, he had better keep off the witness stand if the prosecution is at liberty to ransack his past life. Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against him, and conduce more to his conviction, than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this,—knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case if they think him a scapegrace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence except so far as it tended to impeach the testimony of the party; but what good would that do? And it is not at all improbable but that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender. Such a practice would necessarily prevent the party accused from ever offering himself as a witness, which would leave the jury to conjecture, and speculate why he pursued such course, and often, very prob-

ably, they would draw an unfavorable inference from the circumstance.”

The rule in the State of California is thoroughly well settled that where a defendant takes the stand and testifies, his failure to testify upon any particular point, cannot be commented on in the argument by the prosecuting attorney or by the Court in its charge to the jury.

In the case of *People v. O'Brien*, 66 Cal. 602, it is held that a defendant in a criminal prosecution, who has become a witness in his own behalf, cannot be cross-examined as to any fact or matters not testified to by him on his examination in chief, and if the trial court permit a more extensive cross-examination, the right secured to the defendant by Section 13, Article 1 of the Constitution of the State of California, declaring that no person shall “be compelled, in any criminal case, to be a witness against himself,” is violated.

In the case of *People v. Sanders*, 114 Cal. 216, 238, one of the leading authorities on the subject in the State of California, the opinion of the court being delivered by Justice Henshaw, the Supreme Court of this State said:

“We note no other points presented by appellant that seem to call for especial comment saving the objection of the argument of

the district attorney before the jury. A book of blank drafts introduced in evidence was claimed by the prosecution to be in a different condition from that in which it was upon a former trial. Defendant was not interrogated upon the subject of the book. The district attorney in argument commented on this, saying that if it was in the same condition now as it had previously been, the defendant, better than anyone, could have explained and testified to that fact. *Defendant's failure to testify upon any particular point could not be commented on in argument.* (People v. McGungill, 41 Cal. 429; State v. Fairland, 121 Mo. 137.) For the foregoing reasons the judgment and order are reversed and the cause remanded for new trial."

In the case of People v. McGungill, 41 Cal. 429, it was held that the fact that a defendant offers himself as a witness in his own behalf does not change or modify the rules of practice, with reference to the proper limits of a cross examination, and does not make him a witness for the State against himself.

It was further held that in such a case, it is irregular for the counsel for the prosecution, against the objections of the defendant's counsel, to comment, in his argument to the jury, upon the refusal of the defendant to be cross examined to the whole case; and for the Court to permit a continuation of such comments, against such objections, is erroneous, and prejudicial to the rights of the defendant.

The Supreme Court of California said:

“It appears from the bill of exceptions that ‘one Yates was called and sworn as a witness for the prosecution, and, among other things, stated that he had a certain conversation with the prisoner.’ This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon the fact before the jury; that the defendant refused to be cross examined in the whole case; that defendant’s counsel protested against said comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, as against objections of the defendant’s counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of defendant. (People v. Tyler, 36 Cal. 522.)

“The fact that defendant offered himself as a witness in his own behalf, did not, as to him, change or modify the rules of practice with reference to the proper minutes of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant’s rights, and then, with the sanction of the Court, and argument of the jury,

to comment upon the failure of such attempt as the circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned.”

For an excellent statement of the general law on this subject, we commend the opinion of Chief Justice Sawyer (afterwards United States Circuit Judge) in the case of *People v. Tyler*, 36 Cal. 522, 527 et seq.

In the case of *State v. Elmer*, 115 Mo. 401, it was held that the right of a prosecuting attorney to comment on the testimony of a defendant who has testified in his own behalf extends no further than does the right to cross examine such defendant as to matters testified to by him in his direct examination. The Supreme Court of Missouri, in considering the following language, said:

“The bill of exceptions shows, however, that the defendant was sworn as a witness in his own behalf and that the prosecuting attorney in his closing remarks to the jury, among other statements, said that: ‘*Although the defendant was sworn on his own behalf he nowhere denied that he received the money from Minnie Lay. Neither did he deny but what he was guilty.*’ That ‘*his attorney did not dare to ask him these questions while on the stand, and why did they not ask him these questions of importance? Gentlemen, they did not dare to ask them!*’ These statements were objected to at the time and the attention of the court called to them and asked to rebuke the attorney

making them, but the court did not sustain the objection or pay any attention to it.

“Defendant had stated while on the witness stand that on Saturday, the day next preceding the night on which the money is alleged to have been stolen, he had a \$20 bill, two tens, and \$7 or \$8 in money. He was not asked on his direct examination how or where he got it, or whether he was guilty as charged or not. But he did state on his cross examination that he worked for it, that he got in a little game or so in Kansas City, Kansas, and that he ran a little game in Albuquerque.”

After referring to a number of decisions in the State of Missouri, the Supreme Court continued:

“Governed then by the rule announced in these decisions the state would have had no right to cross examine the defendant as to where and how he got the money, had it been objected to, or whether he was guilty of having stolen it, and if he had not gotten it from Minnie Lay. If then this be the rule as laid down by this court, and we so understand it, the remarks objected to as herein set forth were entirely out of the record, unauthorized by the evidence in the case and prejudiced to the rights of defendant.

“Counsel in addressing juries in cases of this character have frequently been admonished by this court of the impropriety of making statements unauthorized by the evidence and facts, and thus inject error for which they have been and must continue to be reversed. We regret the necessity of having

to reverse this case as we are compelled to do under repeated adjudications upon the ground alone of the remarks of the prosecuting attorney in his closing address to the jury. The judgment is reversed and the cause remanded. *All concur.*”

In the case of *State v. Fairlamb*, 121 Mo. 137, 150, the Supreme Court said:

“Much of the closing argument of the counsel for the state in his address to the jury was out of place, and should not have been permitted by the court in any case, much less upon a trial when the life of a human being was at stake. *State v. Ulrich*, 110 Mo. 365; *State v. Warford*, 106 Mo. 55; *State v. Young*, 105 Mo. 634; *State v. Young*, 99 Mo. 666; *State v. Jackson*, 95 Mo. 623. Counsel in their argument should be confined to the record, the facts in proof and instructions of the court, but may properly draw, by way of argument, and deduction that naturally flows therefrom.

“*It was improper to comment on defendant's failure to testify to any particular fact.* *State v. Graves*, 95 Mo. 510; *State v. Elmer*, 115 Mo. 401; *State v. Walker*, 98 Mo. loc cit. 118.”

Taking up another phase of this argument, it is to be observed that a reading of the trial Judge's charge to the jury, containing the erroneous instructions, to which our assignments of error are addressed, will disclose that the trial Judge appreciated, and in fact so instructed, the jury, that:

“Now this was the defendant’s privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony.” (Transcript of Record, p. 390.)

But, the learned trial Judge immediately nullified this instruction by continuing as follows:

“But in passing upon the evidence in the case for the purpose of finding the facts, you have a right to take this *omission* of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant’s silence; but *where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; SINCE IT IS A LEGITIMATE INFERENCE THAT, COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM, HE WOULD HAVE DONE SO.*” (Transcript of Record, pp. 390-391.)

These instructions were, obviously, inconsistent with each other, contradictory, confusing and must have misled the jury. The jury was told, in one breath, that it was the "defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony," and, in the very next breath, the jury was told, if he did avail himself of his privilege, that, "in passing upon the evidence in the case for the purpose of finding the facts, you have a right to take this *omission of the defendant into consideration*," and further dilated upon and intensified this erroneous instruction by adding:

"But where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and *if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusions as to his guilt or innocence*; SINCE IT IS A LEGITIMATE INFERENCE THAT, COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVI-

DENCE AGAINST HIM, HE WOULD HAVE DONE SO.” (Transcript of Record, pp. 390, 391.)

7 Ency. of U. S. Sup. Ct. Repts., title “Instructions,” p. 33, Sec. 9, and cases cited.

It is plain that the trial Judge told the jury, at the outset, that the defendant was well within his rights in limiting his testimony, but he practically takes that all back when he instructs the jury that it may take this “omission into consideration.” He instructs the jury that it is a right of the defendant to limit his testimony, but he immediately follows that up by practically telling the jury that if a defendant avails himself of this right it is *to be considered against him*. We respectfully submit that it is too plain for argument that the trial Judge committed error, in charging the jury as he did.

There is another aspect of the erroneous instructions excepted to and made the basis of these assignments of errors, as well as the rulings of the trial Court, and its comments, during the opening and closing arguments of the prosecuting attorneys, which compels us further to complain about these instructions.

The instructions as given, we respectfully insist, are in direct conflict with and contrary

to that portion of the charge to the jury regarding the doctrine of the presumption of innocence and of reasonable doubt.

What was the effect of these instructions? The trial Court said, in effect, that by reason of the fact that the defendant had taken the stand as a witness for himself, that, perforce, the jury could disregard the prior instruction of presumption of innocence. In other words, that the probative effect of the presumption of innocence had lost its efficacy and could be disregarded by the jury in arriving at its verdict. That the burden of proof had shifted and that the moment defendant took the stand it was incumbent upon him to prove himself innocent. Has a trial Judge in a criminal prosecution the right to so instruct? If that is the law, then no defendant in a criminal case could safely take the stand to refute any statement or be sworn for any purpose.

Mr. Justice Harlan, in *Davis v. U. S.* 160 U. S. 469, on pages 486-7, placing the burden of proof on a plea of insanity in a criminal case, says:

“In a certain sense it may be true that where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force

of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged."

Upon the point that the presumption of innocence is legal evidence for the jury, Mr. Justice White, in the Coffin case, pages 459, 460 and 461, says (156 U. S., 432) :

"In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

"Greenleaf thus states the doctrine: 'As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore, evidence is received to repeal this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence, to the benefit of which the party is entitled.*' (On Evidence, Part 1, Sec. 34.)

"The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor

of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof in the full extent of their legal efficacy.

“Whether thus confining them to ‘the proofs’ and only to the proofs would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. ‘The proofs and the proofs only’ confined them to those matters which were admitted to their consideration by the court, and among these elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him.”

That the rule invoked by the trial Court below is the rule in civil cases is well established. But in criminal cases, where the witness failing to disclose is the *defendant himself*, another rule must prevail.

Mr. Justice White in the thoroughly considered case of *Coffin v. U. S.*, 156 U. S. 432, 39 L. Ed. 481, very ably defines and differentiates the doctrines of presumption of innocence and reasonable doubt in criminal cases.

From Mr. Justice White’s definition, it will very clearly be seen that the presumption of innocence permeates the whole case and is to

be carried through and delivered to the jury as *legal evidence* to be placed in the scales of justice with the evidence adduced upon the trial on behalf of the defendant.

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law.”

9 Ency. U. S. Sup. Ct. Repts., title “Presumption and Burden of Proof,” I, F, 2, p. 623, and cases cited.

The rule is as binding upon the Courts as though expressly contained in the Federal Constitution. It is fundamental; and, being such, is indispensable to a fair trial in the prosecution of criminals in this country. It is a probative legal fact which *must* go to the jury with all the other evidence and testimony.

“Innocence is presumed in a criminal case until the contrary is proved; or, in other words, reasonable doubt of guilt is in some cases of the kind ground of acquittal, where, if the probative force of the presumption of innocence were excluded, there might be a conviction; but the presumption of innocence as probative evidence is not applicable in civil cases. * * *”

Lilienthal's Tobacco v. U. S., 97 U. S. 267.

In the case at bar, the trial Court, after instructing the jury as to the presumption of innocence of the defendant, continued as follows:

“But where a defendant elects to go upon the witness stand, and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence.” (Transcript of Record, p. 440.)

Therefore, as above stated, we respectfully insist that the above instruction is in direct conflict with and contrary to that portion to the trial Judge’s charge to the jury regarding the doctrines of presumption of innocence and of reasonable doubt.

Furthermore, the instructions were unconstitutional.

The Supreme Court, in *Councilman v. Hitchcock*, 142 U. S. 547, 585, said:

“It is quite clear that legislation cannot abridge a constitutional privilege * * *.”

The same rule applies with equal force to the other branches of our Government.

When the Court below instructed the jury to the effect that it could construe defendant’s

silence as corroborative evidence of all the material evidence adduced against him, the instruction was in direct conflict with Amendment V. It abridged a constitutional privilege. "Nor shall (any person) be compelled in any criminal case to be a witness against himself." The instruction made the defendant a witness against himself. His silence was legal evidence. As we have shown under another assignment of error, the prosecution could not elicit this evidence by cross examination of defendant. Neither could the prosecution call the defendant for its witness and compel the defendant to so testify? This is the effect of the charge. The Court accomplished for the prosecution what the law and the Constitution forbid the prosecution to bring to pass.

"These statutes, (authorizing a defendant in a criminal action to testify in his own behalf), however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must

be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.”

Cooley’s Constitutional Limitations,
(original paging) 317.

Without multiplying authorities or indulging in further argument on this subject, we respectfully submit that serious and reversible errors were committed.

II.

THE COURT ERRED IN ITS REFUSAL TO INSTRUCT THE JURY, AS REQUESTED BY COUNSEL FOR THE DEFENDANT; (1) TO DETERMINE FROM ALL THE EVIDENCE AND CIRCUMSTANCES IN THE CASE, UNDER APPROPRIATE INSTRUCTIONS, WHETHER MARSHA WARRINGTON AND LOLA NORRIS, OR EITHER OF THEM, WERE ACCOMPLICES OF THE DEFENDANT; AND (2) IF THE JURY SHOULD ARRIVE AT THE CONCLUSION, UNDER SUCH INSTRUCTIONS, THAT MARSHA WARRINGTON AND LOLA NORRIS, OR EITHER OF THEM, WERE ACCOMPLICES OF THE DEFENDANT, THEN TO FURTHER INSTRUCT THEM THAT THE TESTIMONY OF AN ACCOMPLICE SHOULD BE RECEIVED WITH CAUTION AND WEIGHED AND SCRUTINIZED WITH GREAT CARE BY THE JURY AND THE JURY SHOULD NOT REGARD THE EVIDENCE OF AN ACCOMPLICE UNLESS SHE IS CONFIRMED AND CORROBORATED IN SOME MATERIAL PARTS OF HER EVIDENCE.

The learned trial Judge refused to give any of the instructions requested by counsel for defendant upon the subject of accomplices, basing such refusal upon the ground that he did not consider Marsha Warrington and Lola Norris, or either of them, accomplices of the defendant.

In this view, he was clearly in error. The conviction of the defendant upon the first four counts of the indictment, if such conviction can be sustained at all, depended entirely upon the testimony of Marsha Warrington and Lola Norris, or of either of them. Assuming, for the sake of argument, that the testimony of Marsha Warrington and Lola Norris, or either of them, was sufficient for any purpose at all in the case, we stoutly maintain that there was evidence tending to show that they were accomplices of the defendant, and the judge of the Court below should have submitted to the jury, under appropriate instructions, first, the question whether or not they were accomplices; and, second, he should have given the cautionary instructions applicable to the testimony of accomplices, which it is the almost universal practice for all courts, State and Federal, to give; and, third, he should have further instructed them that one accomplice cannot corroborate another accomplice.

The requested instructions on this subject, which the trial Judge refused to give, to which refusal counsel for defendant took timely exceptions and have embodied said exceptions in proper assignments of error are as follows:

(Assignment of error Number 110; Transcript of Record, pp. 88, 395, 401.)

“The Court erred in refusing to give to the jury instruction Number 31 requested on behalf of defendant, which instruction is in the words and figures following, to-wit:

When a crime involves the cooperation of two or more people, the guilt of each will be determined by the nature of that cooperation. Whenever the cooperation of the parties is a corrupt cooperation, these parties cooperating are accomplices, the one with the other, because their conduct is corrupt, and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary.”

(Assignment of error No. 111; Transcript of Record, pp. 88, 89, 395, 402.)

“The Court erred in refusing to give to the jury instruction No. 32 requested on behalf of defendant, which instruction was in the words and figures following, to-wit:

You are instructed that every person of legal responsibility who voluntarily cooperates with, or aids, or assists, or advises, or encourages another in the commission of a crime, is an accomplice, without regard to the degree of his guilt, and without regard to whether or not

they may be indicted as principals. One is an accomplice for what he has done, and not because of the form of punishment which the law may mete out for his acts.”

(Assignment of error No. 113, Transcript of Record, pp. 89, 395, 402, 403.)

“The Court erred in refusing to give to the jury instruction No. 34 requested on behalf of defendant, which instruction is in the words and figures following, to-wit:

I instruct you, as to the witness, Marsha Warrington, if you believe her testimony, that she is an accomplice of the defendant, and, in this connection, I further instruct you that while it is permissible in the Federal Courts to convict upon the uncorroborated testimony of an accomplice, still I further instruct you that before convicting the defendant on the uncorroborated testimony of an accomplice, you should view their testimony with great care and caution.”

(Assignment of Error No. 112, Transcript of Record, pp. 89, 395, 402.)

“The Court erred in refusing to give to the jury instruction No. 33 requested on behalf of defendant, which instruction was in the words and figures following, to-wit:

You are further instructed that the testimony of accomplices, if you should believe and be satisfied beyond all reasonable doubt and to a moral certainty that Marsha Warrington and Lola Norris, or either of them, were the accomplices of the defendant, should be re-

ceived with caution and weighed and scrutinized with great care by the jury, and their evidence should not be accepted or regarded by the jury unless they are confirmed or corroborated in some material parts of their evidence connecting the defendant with the offense charged.”

There was testimony introduced during the trial, amply justifying the giving of the requested instruction. The testimony of the defendant Diggs himself was alone sufficient to require the trial Judge to give the requested instructions. He testified, among other things, as follows:

“Q. Do you remember a conversation in your office January 31st, 1913, prior to the trip to San Francisco, in which Mr. Caminetti, Miss Norris and Miss Warrington were present, in which Mr. Caminetti said that he could not afford to go on the trip, that his wife was about to go to the hospital, that he needed his money for his wife, and that Marsha Warrington said, *‘You’re a piker, we girls have framed this trip up and you have got to go along’?*

“A. Yes, I remember that conversation. You have stated it correctly.” (Transcript of Record, p. 321.)

* * * * *

‘I said to Marsha ‘that is enough, the Juvenile officers are after us, my father is here to carry out his intentions and I am going to go, I am going to get out of this town for awhile, I am going to go away from here, this is too hot for me.’ *Then Marsha said, ‘Well,*

old boy, believe me, you're not going away and leave me here.' I said 'Miss Warrington, you can do just as you please, but I am going to go away from here for awhile. I have too much to lose, and I have too good a family to bring trouble down on them and I am going to go away.' She said, '*I am going too, you are not going away and leave me.'* Thereupon Mr. Caminetti spoke up something about Miss Norris. Then she said, '*If Miss Norris doesn't want to go, I'll make her go, she has got to go away with me.'* Miss Warrington said that about Miss Norris.'" (Transcript of Record, p. 324. * * * * *)

"During the last week ending March 9th Miss Warrington and Miss Norris met me at the Columbia Hotel, they came up and seen me about 4 o'clock in the afternoon. I think that either Mr. Caminetti told them or I told them that I was there. I believe that I called Miss Warrington up. Miss Warrington came up there. It was in regard to our conditions. The specific arrangement was for all to come up there, whether it was on my suggestion or Mr. Caminetti's, I have forgotten which. I told her that I thoroughly and positively made up my mind to leave town; I said, 'I am going to Los Angeles for a week or two, and I have just got to go, that is all there is to it.' It was very much worried, in fact I was scared to stick my nose out of that room. On that occasion I told her all about my business, all about my relations, and I told her that this thing was getting too much for me, that I had too much to lose, and had a good home and a good wife and too nice a child to take any chances. I said, 'Miss Warrington, we have to quit our going to-

gether, we have to cut it out, everybody is getting on to us.' She broke in and said, 'Yes, you bet your life they're getting on to us, a friend of mine who is a newspaper reporter, told me we were going to be written up in the 'Sacramento Bee.' I said 'Who was it?' She said 'Alfred Putnam.' I said, 'What did he say to you?' She said that he said that one of the editors had got wise to our actions and had an article all written up and that he was going to run it and was going to publish it immediately but through his influence and through his respect for my father, owing to the fact that they were both Masons, had got the article squelched, and got it stopped. I said 'Are you sure they had an article?' She said 'Why positively, he told me it was all written up and he saw it.' I said, 'Don't you think that is a little grand-stand play on Putnam's part?' and she said 'No sir, that is the truth.' I said, 'By jinks, that is getting pretty serious.' She said, 'Yes, I guess you have had about all you want of the 'Sacramento Bee,' haven't you? And I said 'Yes, I had, that I didn't want to get into any tangle with them, that I didn't want them to ever write me up. Then the conversation drifted on back into the fear that was overtaking the whole crowd. I thoroughly declared myself that I was going. *Marsha said, 'Well, if you're going I am going too, you're not going to leave me here with the bag to hold and face all this trouble.'* I said Miss Warrington, you can do just exactly as you please about it, I don't intend to ask you to go or ask you to stay home, it is your business and you can do as you please.' *She said, 'Well, I am going.'* Lola Norris said, 'I can't go. I am not going, my father is not feeling well and it

would break my mother's heart for me to go.' And Marsha said, 'Yes, and it will break my father's heart too.' Somebody said something about her mother. She said 'Well, I don't care about my mother, my mother and I don't get along anyhow.' Miss Warrington said she would like to go to spite her mother, her step-mother. Her aunt is her step-mother. She said her father had always been very good to her and she liked her father and didn't want to leave him. I said 'That is up to you, you people can do as you please, but I am going to get out of here. That is final and positive. I am going. I don't care what the rest of you do, Mr. Caminetti or any of you. I have too much to lose. *When Lola said it would break her mother's heart to go Marsha said, 'Well, I can't help that, you've got to go with me, you've got to go along with me.'* Lola, to my knowledge, did not say whether she was going or not. Then Mr. Caminetti spoke up and he says these words very distinctly—he was sitting on the other side of the table; he says, 'Now, girls, I want to make myself understood right here;' he says, 'If Diggs is going I am going,' and he says, 'If you people go with us that is your business;' he says, 'Now, I don't want you girls to leave with the idea that you're going to get any great or glorious or glittering future, *I want to go on record right here as saying that I don't want you to go, I would rather have you stay home here, I don't want to be bothered with women in this business, if Diggs and I are going to get arrested and are trying to get away from arrest we don't want to be hampered with women, I want to go on record right now as not persuading you girls to go or asking you to go; on the*

other hand, if you are going to go we would rather have you go in some other direction.' *Marsha sat up and said, 'We are not going to go in any other direction, if you and Diggs are going we will go with you, you can't leave us, if you leave us here and leave us to go in another direction we will never see you again, that will be the end of you, we will never see you again.'* The conversation kept on running along the lines of the impending trouble that was overshadowing us and overhanging us. We laid a great deal of stress upon the newspaper article that Miss Warrington had told me about. Miss Warrington asked me if I had heard anything about it and I said no I had not heard anything about any newspaper article. I knew that if the 'Sacramento Bee' knew anything about it they would really write us up and give us an awful roast. I believed it. I said I thought the 'Sacramento Bee' would write us up if they had occasion to. I never caught Miss Warrington in a lie up to that time. I was trying to find out if it was the truth. I said 'Well, with all this newspaper stuff, and with what Diepenbrock has told me and these threats that your father is going to shoot me it is inevitable, I am going away, and you may not see me after today because I am going to get out of here, I may go any minute, you can make up your mind what you are going to do and suit yourselves.' With that the girls left. I don't believe I saw her again only to talk to her over the telephone. I talked to her a couple of times over the telephone, I believe, I didn't have very much to say of consequences. After I had been to San Francisco and came back I met her on the Saturday afternoon, or Saturday noon rather, at the

Peerless Restaurant. I was to meet Miss Norris there—I mean Miss Warrington there, it was purely an accident that Mr. Caminetti and Miss Norris met us there. They came in to have dinner and happened to see me and came in our box and sat down. There the question came up again and Marsha said she had thoroughly made up her mind to go and she was going with me. *Lola said she was not going, she could not go, that it was impossible for her to go. She again spoke of the condition of her mother, and again Miss Warrington said it didn't make any difference, that she had to go; she said 'I am going and you have got to go along with me;'* and I believe that Miss Norris said that she was going, if I remember right.”

* * * *

“Then there was another conversation Sunday afternoon. That was out at 28th and “J” Street. I believe I had called Miss Warrington up and made an appointment to meet her out there at the Park, and through a coincidence we got on the same car together at 17th and “J” and rode out as far as 28th and “J;” I got off at 27th; I think they got off at 28th or 29th and walked back; anyhow we met at the Park and had quite a conversation. That was relative to my going way. I still maintained that I was going South to get away from all this trouble. *Miss Warrington said 'Well, I have thoroughly made up my mind I am going too, I am going with you.'* *Miss Norris had said that she was not going. Marsha upon that occasion where we were sitting in the Park there said, 'That's it, you have always had cold feet and you're getting cold feet right at the last minute.'* She said, *'It will be a*

pretty mess, Lola, if you stay here and the rest of us are gone and you repeat all these actions to everybody that pumps you about it, the authorities and everybody else will ask where we have gone and you will tell. I am not going to leave you for this reason, you can't keep it to yourself where we have gone.' Miss Warrington was the one who induced Miss Norris to go. *She never would have left Sacramento if it had not been for Miss Warrington under the conditions, I don't believe.* The proposition was thoroughly settled right there, that we were going to get out of town. We had not talked at that time of exactly where we would go, or anything of the kind, but I was very much of the opinion that I wanted to go to Los Angeles owing to the fact that I had a lot of friends there that had lived there and thought for a week or so I could have a good time down there and come back home and everything would be all right. I did not intend to take the girls. I did not care whether they went with me or went alone. In fact, I wanted Miss Warrington to stay." (Transcript of Record, pp. 335-340.)

This testimony certainly places Marsha Warrington in the light of a very active accomplice. It is most significant that Marsha Warrington was not asked to deny the testimony of the defendant Diggs in this connection. Although there was an opportunity to recall her to the stand after the defendant had rested his case, to deny his testimony as to her pernicious activity and insistence in getting

Lola Norris to go away with her, she was not recalled to deny his testimony.

The truth of the testimony, as to whether Marsha Warrington and Lola Norris, or either of them, were accomplices, was for the jury to pass upon and determine. It being clearly a question of whom the jury should believe, whether the testimony of the defendant Diggs or the testimony of the two young women, their credibility was of the greatest importance, not only the credibility of the defendant but the credibility of the two young women. If the testimony of the defendant was true, then certainly Marsha Warrington was an accomplice with the defendant. This is plainly indicated from such statements as: "*You're a piker, we girls have framed this trip up and you have got to go along,*" addressed to Caminetti, (Transcript of Record, p. 321); "*I am going too, you are not going away and leave me,*" * * * "*If Miss Norris doesn't want to go, I'll make her go, she has got to go away with me,*" addressed to both Diggs and Caminetti, (Transcript of Record, p. 324); "*Well, I can't help that, you've got to go with me, you've got to go along with me,*" addressed to Lola Norris, (Transcript of Record, p. 325); "*We are not going to go in any other direction,*

if you and Diggs are going we will go with you, you can't leave us, if you leave us here and leave us to go in another direction we will never see you again, that will be the end of you, we will never see you again," addressed to Diggs, Caminetti and Lola Norris, (Transcript of Record, p. 337); *"I am going and you have got to go along with me,"* addressed to Lola Norris, (Transcript of Record, p. 339); *"Well, I have thoroughly made up my mind, I am going too, I am going with you,"* * * * *"that's it, you have always had cold feet and you're getting cold feet right at the last minute,"* *"It will be a pretty mess, Lola, if you stay here and the rest of us are gone and you repeat all these actions to everybody that pumps you about it, the authorities and everybody else will ask where we have gone and you will tell. I am not going to leave you for this reason, you can't keep it to yourself where we have gone,"* addressing both Diggs and Lola Norris, (Transcript of Record, pp. 339, 340.)

Aside from these poignant pieces of evidence, the record is replete with many other acts and statements of Marsha Warrington showing her active complicity. There is also abundant testimony to show that Lola Norris herself was a willing accomplice.

It was, therefore, of the highest importance to the substantial right of defendant to a fair and impartial trial, that appropriate instructions should have been submitted to the jury as to what act or acts or conduct constituted one an accomplice, and that the jury should be carefully instructed as to what weight should be attached to the testimony of an accomplice. The learned trial Judge declined to give any instructions whatever on this subject.

A perusal of the testimony in the record, particularly the testimony of Marsha Warrington and of Lola Norris, will disclose the pernicious activity of Marsha Warrington in inducing Lola Norris to accompany them and in causing her to be transported and aiding and assisting in her transportation from Sacramento, California, to Reno, Nevada. She was the intimate and almost constant companion of Lola Norris. She was somewhat older than Lola Norris, her age being 22, and that of Lola Norris being 20. She had the highest incentive to leave Sacramento on account of her delicate condition and naturally wanted her intimate friend, Lola Norris, to accompany her. She was present at almost all of the interviews at which Maury I. Diggs and Lola Norris were present. She was present at the

important interview held on Sunday, March 9, 1913, when both she and Lola Norris finally and decisively made up their minds to leave Sacramento. At this all-important meeting Maury I. Diggs was present with Marsha Warrington and Lola Norris, but it is a most significant fact that the defendant Caminetti was absent from that meeting. It was Marsha Warrington who took a suit case with her containing articles of wearing apparel and for female toilet use. Miss Norris took nothing with her or comparatively little.

A mere reading of the testimony of Miss Norris and Miss Warrington, aside from the direct and positive testimony of the defendant, discloses the pernicious activity of Miss Warrington.

Furthermore, the testimony of these two young women discloses beyond question that neither one was an innocent "victim" of any act of the defendant conducing to their transportation; on the contrary, the evidence shows that they went willingly and of their own free will and with the single purpose, at the time of their departure from Sacramento, to escape impending notoriety, scandal and disgrace as the result of their indiscretions. If there was any other purpose in their departure, that pur-

pose was not formed until afterwards and after the furnishing of the transportation. In other words, the purpose in leaving Sacramento was not, as is alleged in the first four counts of the indictment (upon which counts the defendant was convicted) "that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant," and Lola Norris the mistress of Caminetti respectively, but the purpose was a different one, entirely disassociated from any object of immorality or concubinage.

Neither Marsha Warrington nor Lola Norris were "victims. They were willing accomplices. They both "knowingly and voluntarily, and with common intent with the principal offender, united in the commission of an offense," assuming, for the sake of argument only, that any offense at all was committed by the defendant. ~~Caminetti~~.

The above often cited quotation is taken from the opinion of Judge Maxey in *United States v. Ybanez*, 53 Fed. Rep. 536, 540, where the learned Judge used the following language, so apposite to the case at bar:

"An accomplice 'is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense.'

“It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, *always to be received with caution, and weighed and scrutinized with great care by the jury*; and it is usual for the courts to instruct juries—and you are so instructed in this case—not to regard the evidence of an accomplice *unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony.*”

Some of the requested instructions, which were refused, were, almost word for word, taken from the language of Judge Maxey in the case above cited. (See especially Assignments of Error Nos. 110, 111, 113; Transcript of Record, pp. 88-89, 395, 401-403.)

There was ample evidence, as disclosed by the transcript of record, which required the trial Judge to submit to the jury, under appropriate instructions as requested on behalf of the defendant, the question, first, whether Marsha Warrington and Lola Norris, or either of them, were accomplices of the defendant; then, second, if the jury should so find, the cautionary instructions should have been given advising the jury of the weight they should

accord to the testimony of an accomplice; and, third, that an accomplice cannot be corroborated by another accomplice.

The evidence contained in the Transcript of Record discloses that Lola Norris and Marsha Warrington were willing accomplices with the defendant. They were not coerced. They were not unwilling or innocent victims. The jury acquitted the defendant upon both counts in the indictment in which he was accused of having persuaded or induced or enticed either Lola Norris or Marsha Warrington to leave Sacramento and go to Reno. Aside from this verdict of the jury, eliminating from the case any question of persuasion or inducement or enticement on the part of the defendant, a reading of the evidence in the record shows that both Lola Norris and Marsha Warrington were willing accomplices. They come clearly within the definition of what constitutes an accomplice, as laid down by Judge Maxey in *U. S. v. Ybanez*, *supra*.

Furthermore, it is the well settled rule that one of the participants in the act of fornication, or adultery, or in the act of incest, if the participation is *voluntary and with guilty knowledge*, is an accomplice.

CYC, Vol. 12, pp. 447, 448, and cases there cited.

In the leading case on the subject of accomplice, in California, of *People v. Coffey*, 161 Cal. 433, 447, it was said:

“In adultery and fornication, where the willing consent of the woman is proven or assumed, the courts have found no difficulty in declaring her to be an accomplice with the man. For there, differing from abortion, no considerations of the temptation of the woman’s hard lot operate to soften the court’s views. They are accomplices the one with the other because their conduct is corrupt and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary. (Citing *State v. Scott*, 28 Or. 331, 42 Pac. 1; *Merritt v. State*, 12 Tex. App. 203; *Townser v. State*, 58 Tex. 453, 137 Am. St. Rep. 976, 126 S. W. 572.)”

Aside from this, the view entertained by the Supreme Court of the United States, and announced in the case of *Bennett v. United States*, 227 U. S. p. 333, one of the leading “White-slave cases,” recently decided by the Supreme Court, is in accord with our contention.

It was complained, in that case, that the trial Court had erred in its instructions to the jury in regard to the extent of the corroboration Opal Clarke’s testimony had received.

We quote from the opinion of the Supreme Court:

“(1) Defendant was indicted for having caused the transportation of *Opal Clarke*.
* * *

“(5) The basis of this contention is that Opal Clarke was the accomplice of defendant as to Ella Parks, and that hence the Court erred in its instructions to the jury in regard to the extent of corroboration Opal Clark’s testimony had received.

“The instruction complained of submitted to the jury the fact, and warned against a conviction upon the uncorroborated testimony of an accomplice, and said: ‘Necessarily, if you find that she was an accomplice with respect to these charges or any of them, you will then necessarily have to inquire into the facts as to whether or not there is corroborating testimony. There is evidence tending to corroborate her testimony, and it is for you to consider its force and value and the weight to give to it.’ The contention is that this was error, ‘as the Court instructed the jury that there *was* corroborating evidence, when the Court should have charged the jury that it was for them to ascertain from the testimony whether or not there was corroborating testimony.’ The objection is hypercritical. The Court did not instruct the jury that there was corroborating testimony, but testimony of that tendency; and added that the force and weight of its corroborating power was for the jury to determine.”

It would seem from the opinion in the above case, that there were two girls involved in that

transportation, one Opal Clarke and another Ella Parks; just as in the case at bar there are two involved, Marsha Warrington and Lola Norris. We contend that Marsha Warrington was undoubtedly an accomplice as to Lola Norris. As the testimony discloses, the defendant testified that she insisted on Lola Norris going away with her. (See Transcript of Record, pp. 321, 324, 337-340.) We further contend that inasmuch as whatever Lola Norris did was purely voluntary on her part, she also was an accomplice.

The common law rule, which prevails in the Federal Courts, is that a defendant may be convicted upon the uncorroborated testimony of an accomplice. But the practice of the courts, where such doctrine obtains, is to warn the jury of the danger of convicting unless the accomplice be strongly corroborated. The general rule is well stated in Greenleaf on Evidence (6th ed.), vol. 1, p. 493, as follows:

“Sec. 380. The degree of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But, there is no such rule of law, it

being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an *omission of duty* upon the part of the judge.”

No common law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the court *should* and *usually does* instruct them to that effect, they may, in the absence of a statutory provision to the contrary, convict upon the evidence of an accomplice alone, although uncorroborated.

CYC., vol. 12, p. 453;

United States v. Ybanez, 53 Fed. Rep. 536;

United States v. Fleming, 18 Fed. Rep. 907;

United States v. Harries, 26 Fed. Cas. No. 15309, 2 Bond. R. 311;

United States v. Smith, 27 Fed. Cas.
No. 16322, 2 Bond. R. 323;

United States v. McKee, 26 Fed. Cas.
No. 15685, 3 Dill. R. 546;

United States v. Lancaster, 26 Fed.
Cas. No. 15556, 2 McLean R. 431;

United States v. Reeves, 36 Fed. Rep.
404;

United States v. Van Leuven, 65 Fed.
Rep. 78;

United States v. Sykes, 58 Fed. Rep.
1004;

United States v. Kessler, Bald. R. 22;

United States v. Sacia, 2 Fed. Rep. 708;

People v. Bonney, 98 Cal. 278;

People v. Coffey, Cal. App.;

See, also, Sec. 1111, Penal Code Cal.

The trial court not only declined to instruct the jury in the language requested by counsel for defendant, but failed to give any instructions at all to the jury advising them to be cautious in convicting upon such testimony, and as to what weight should be accorded such evidence.

Although an accomplice is a competent witness for the prosecution, his testimony should be received with *great care and caution*.

United States v. Smith, Fed. Cas. No. 16322;

United States v. Babcock, Fed. Cas. No. 14487;

United States v. Goldberg, Fed. Cas. No. 15223;

United States v. McKee, Fed. Cas. No. 15686.

Except in one State, it seems to be the well-established and almost universal practice for the court to instruct that the testimony of an accomplice should be viewed by the jury with *great care and caution*.

See cases cited in Blashfield on Instructions to Juries, p. 485.

And a refusal to so instruct is ground for reversal.

Solander v. People, 2 Colo. 48;
 Cheatham v. State, 67 Miss. 335;
 People v. Sternberg, 111 Cal. 11;
 People v. Strybe, 36 Pac. Rep. 3;
 People v. Bonney, 98 Cal. 278;
 People v. Coffey, Cal. App.

A conviction founded on the uncorroborated testimony of an accomplice is legal, although it is *almost universal practice, sanctioned by long usage and deliberate judicial approval*, to

instruct juries to be *cautious* in convicting upon such testimony.

United States v. Neverson, 1 Mackey,
152;

United States v. Bicksler, 1 Mackey,
341;

State v. Hyer, 39 N. J. Law;

State v. Honey, 19 N. C. 390;

State v. Miller, 97 N. C. 484.

In United States v. Sykes, 58 Fed. Rep. 1000, 1004, Judge Dick, in charging the jury, said:

“The degree of credit which ought to be given to the testimony of an accomplice is a matter *exclusively within the province of the jury*, and they may believe and act upon such evidence without any confirmation of his statements. But it is the *duty* of the judge to advise the jury to consider such testimony with *great caution*, and not to regard it as worthy of credit *without* corroboration by other evidence material to the issues before them. In doing so, the judge does not withdraw the case from the jury by positive direction, but only advises them not to give credit to such unsupported testimony.”

In Hanley et al. v. United States, 123 Fed. Rep. 849, it was held that a defendant in a criminal case in the Federal Courts can not complain because the testimony of an accom-

plíce was submitted to the jury, *under instructions that it should be received with caution and carefully scrutinized.*

There is a total want of such instruction in the case at bar.

In *United States v. Van Leuven*, 65 Fed. Rep. 78, 81, District Judge Shiras said:

“At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the crime. *I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury THAT THEY CANNOT CONVICT UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.*”

The defendant in the case at bar is a citizen of the State of California, and there is a stat-

ute in the State of California similar to that enacted in the State of Iowa.

See section 1111 of the Penal Code of California.

We respectfully submit that the remarks and the course invariably pursued by District Judge Shiras are peculiarly applicable to, and should have been followed in, this case by the trial court.

There is a statute in Texas similar to section 1111 of the Penal Code of California, and in the case of *Martin v. State*, 36 S. W. 587, the Court of Criminal Appeals of Texas, in reversing a case for the failure of the trial court to charge that a conviction cannot be had on the uncorroborated testimony of accomplices, said, after quoting the statute of that State as to accomplices:

“By a long line of decisions, it has been held that, where the state in a criminal prosecution introduces evidence of accomplices, it is incumbent on the court to give in charge to the jury the above article, and then, in all proper cases, to define who are accomplices, or what it takes to constitute persons accomplices in the commission of crime. *This charge should be given, whether asked or not*; but it is especially incumbent on the court, when the matter is pointed out by a bill of exceptions, to give the law on accomplice’s testimony in charge to the jury. (Citing many cases.) It is not

necessary to discuss the testimony of said witnesses. The evidence not only tends to show that said three witnesses were accomplices, and that their testimony was materially prejudicial to the defendant, but the record establishes that the State's case is mainly based on their evidence; *and why the learned judge should have omitted, in a case of this importance, to give to the jury a charge on accomplice's testimony, especially when an exception was taken to his charge in this regard, is to us inexplicable.*"

Applying the case of *Martin v. State* to the case at bar, and under the rule laid down by District Judge Shiras in *United States v. Van Leuven*, *supra*, it is submitted that the trial judge was in error in taking the view that Marsha Warrington and Lola Norris, or either of them, were not accomplices, and in refusing to instruct the jury as requested by the defendant.

While, technically, the learned Judge of the trial Court may have been correct in refusing to give instructions in the precise language requested by counsel for defendant, nevertheless, the duty rested upon him to give to the jury some appropriate instructions, telling them that the testimony of an accomplice is "always to be received with caution, and weighed and scrutinized with great care by the jury.

The jury was left in total ignorance as to whether, in the first place, the witnesses Marsha Warrington and Lola Norris, or either of them, should be considered accomplices of the defendant, under the evidence adduced; and, in the second place, if the jury should consider them under the evidence and instructions of the Court as accomplices, as to what weight should be accorded to the testimony of an accomplice; and, in the third place, if the jury should consider them both under the evidence and instructions of the Court as accomplices, it should have been further instructed that: "The testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another."

CYC. Val. 12, pp. 458, 459, and cases there cited.

In all of these respects, it is respectfully submitted that the trial Judge was in error and that a reversal of the judgment of conviction must follow.

III.

THE ONLY ISSUE INVOLVED IN THE INDICTMENT ESCAPED THE ATTENTION OF THE TRIAL COURT. THIS ISSUE WAS ALSO THE ONLY ISSUE IN THE EVIDENCE. THE WHOLE CHARGE OF THE TRIAL COURT TO THE JURY WAS, FOR THIS REASON, MISLEADING AND ERRONEOUS AND THE JURY WAS BLINDED AS TO THE REAL ISSUE. BY REASON OF THIS, THEREFORE, DEFENDANT FAILED TO RECEIVE A FAIR AND IMPARTIAL TRIAL. (Assignments of Error Nos. 115, 122-123, 124, 130, 151, 152; Transcript of Record, pp. 90, 93, 94, 95, 97, 106, 107, 403, 406, 407, 412, 421.)

The whole charge to the jury is pregnant with the above misconception indulged in by the trial Court.

The Court labored under the impression that the defendant was charged with the interstate transportation of the women for the purpose of "debauchery." The prosecution also misconceived the nature of the issue.

The indictment charges that the defendant transported Marsha Warrington over the lines

of the Southern Pacific Railway, etc., with the intent and purpose that she should “be and become the concubine and the mistress of the said defendant.” The indictment expressly limits the immoral purpose to that of becoming the mistress of the defendant. (Transcript of Record, p. 2.)

That, and that only, is the crime charged against this defendant in the indictment.

The trial Court and the prosecution labored under the impression that the crime charged was the interstate “debauchery” of the woman. The terms “debauchery” and “other immoral purpose” used in the indictment are general terms. But the indictment specifically limits the meaning of the general words and charges a limited offence. The general words are limited and controlled by the specific words following them—“to-wit: that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant.”

It is elementary that, where the words of the statute are general, it is necessary to particularize in the indictment.

Mr. Justice Field, in *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516, said:

“The statute upon which the indictment is founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matters upon which issue could be formed for submission to a jury.”

To the same effect, see:

Keck v. U. S., 172 U. S. 434, 43 L. Ed. 505;

Evans v. U. S., 153 U. S. 584, 587;

U. S. v. Britton, 107 U. S., 655, 661;

U. S. v. Carll, 105 U. S. 611, 612;

U. S. v. Mann, 95 U. S. 580, 585.

As stated, the terms “debauchery” and “other immoral purpose” (practice), used in the statute, are general terms.

The word “debauchery,” in the statute, means carnal knowledge, sexual intercourse of a girl or woman.

State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349.

As was well said by this appellate tribunal, in the very recent case of *Suslak v. United States*, 213 Fed. 913, 917:

“Moreover, the denunciation of the law is not against transportation for the purpose of *debauchment*, but for the purpose of debauchery. In the *Century Dictionary* debauchery is defined as:

“ ‘Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust.’

“So Webster, while giving, as one of the meanings, seduction from virtue, duty, or allegiance, also defines the term as:

“ ‘Excessive indulgence of the appetites, especially excessive indulgence of lust; intemperance; sensuality; habitual lewdness.’

“It was in this sense of unlawful indulgence of lust in which the term was intended to be used in the act.”

Athanasaw v. U. S., 227 U. S. 326; 57 L. Ed. 528.

The uses to which a girl or woman could be subjected by a white slaver, so as to make such female a debauchee, and her master a criminal under the Act, are numerous. It is unnecessary for us to particularize the many indecent practices that come under the head of debauchery and “other immoral practices.” It was for the purpose of reaching this class of human beasts that the act was passed.

See: “The Battle with the Slums,” pp. 69-75, By Jacob A. Riis, N. Y., The McMillan Company, 1902.

Therefore, in order to allege facts in an indictment under this statute, “upon which issue could be formed for submission to a jury,” it becomes necessary to particularize. The

framer of the indictment in the case at bar did so.

The issue in the case at bar was: Did the defendant transport Marsha Warrington to "be and become the concubine and the mistress of the defendant?"

In the first portion of its charge to the jury, the trial court goes at length into the statute. The language, used to inform the jury of the law covering the case and by which they shall be governed, is couched in the general expressions contained in the statute. (Transcript of Record, pp. 371-374.) They are not in any manner qualified or limited to cover or explain the issue involved. Then, later, where the Court defines and charges the jury upon the criminal intent (Transcript of Record, p. 378), the same general language is used.

The framer of the indictment recognized the rule and alleged the facts which constituted the criminal act; but nowhere did the trial Judge charge the jury on the real issue involved. To be sure, the Judge defined the terms "concubine" and "mistress," but never once did he inform the jury that the defendant was charged with transporting the women for the purpose of making them such. On the other hand, the court expressly led the jury to

believe that the defendant was charged with merely seducing the woman, and that, if they so found, they were bound to find the defendant guilty as charged. Our contention is borne out by a reference to the definition given by the trial Court with painstaking particularity to the term "debauchery" (Transcript of Record, p. 376). The defendant, as we heretofore stated, was *not charged* with "debauchery;" but this definition, given with such minute particularity, and in words which seemingly covered defendant's relation with the woman covering a period long prior to the trip to Reno, could not effect a result on the jury other than we maintain.

On page 391 of the Transcript of Record, the trial Court goes even farther and practically withdraws the issue from the consideration of the jury in these words:

"There is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. Therefore, if you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Caminetti cohabited with them, as the testimony tends to show, then you may find that they were taken there with the immoral purpose and intent charged. That is, if the declarations of the

defendant as to his intent and purpose do not accord with his acts you may discard his words if they do not carry conviction to your minds, and base your finding as to his intention upon the acts committed by him."

The whole charge of the court in the case at bar is on a parity with the charge reviewed by the Supreme Court in the Hickory case. (Hickory v. U. S., 160 U. S. 408, 421-422, 40 L. Ed. 474.)

Mr. Justice White, on page 422, in part says:

"The instruction as to the probative weight which the jury should attach to the fact of flight was equally erroneous. It was as follows: 'And not only this, but the law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case.' This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth. On this subject also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give

them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt."

From the portion of the charge quoted above, it is most certain that the real issue in the case at bar was lost to the trial Judge. There was no issue in the evidence as to the sexual relations; there was even no issue as to the cohabitation; but there was issue joined—and it was the only issue in the case—upon the allegation "for the purpose * * that the afore-said Marsha Warrington should be and become the *concubine* and the *mistress* of the said defendant."

We respectfully submit that a man may seduce a woman, and yet that woman, as a matter of law, may not be either his *mistress* or his *concubine*. We also respectfully submit that a man may "co-habit" with a woman not his wife, and still, as a matter of law, that woman might not be his *concubine* or his *mistress*.

But the lower Court assumed, as a matter of law, that if the jury should find that the defendant and Caminetti cohabited with—slept with—or seduced—the women, that in any such event they were guilty as charged.

We respectfully submit that this portion of the charge invaded the province of the jury. That it took away from the consideration of the jury the only issue in the case and left that body with nothing to do but return a verdict of guilty.

Instructions, legally correct in themselves as independent propositions, or as applied to an appropriate state of facts, are erroneous if applied to a state of facts to which they are not adapted.

Pond v. Williams, 1 Gray 630, 636 ;

Wright v. Old Colony & Fall River Railroad Co., 9 Gray 413 ;

Brightman v. Eddy, 97 Mass. 478.

They tend to mislead the jury either into the supposition that a proper state of facts exists to which the propositions are to be applied by them, or into drawing the suggested inference from facts which do not authorize it.

Commonwealth v. Maloney, 113 Mass. 211.

The trial Judge should have given our requested instructions numbered 37, 44, 45, 46, 47, 53, 93, 94 (Transcript of Record, pp. 90, 93, 94, 95, 97, 106, 107, 403, 406, 407, 412, 421 ; Assignments of Error Nos. 115, 122, 123, 124, 125, 130, 151 and 152.)

The defendant was entitled to have the only issue alleged in the indictment and raised by the evidence submitted to the jury. He was entitled to have it clearly stated to the jury that he was not on trial for general immorality or for any other conduct of a reprehensible nature; that he was not on trial for having co-habited with — slept with — or seduced — Marsha Warrington; but that he was charged *only* and on trial *upon the single issue* that it was his intent and purpose: “that the aforesaid Marsha Warrington should be and become the *concubine* and the *mistress* of the said defendant.” (Transcript of Record, p. 2.)

The trial Court gave to the words “concubine” and “mistress,” contained in the above averment in the indictment, “too wide a meaning.”

In the case of *Suslak v. United States*, supra, this appellate tribunal, in passing upon an instruction by the trial Court dealing with the words “unlawful co-habitation,” which was the immoral purpose alleged in the indictment in that case, said:

“On the other hand, we think that the trial court gave to ‘unlawful co-habitation’ too wide a meaning. It is to be noted that this phrase is not used in the White Slave Act at all. The act denounces transportation for the purpose

of prostitution or debauchery, 'or for any other immoral purpose'; and the one count in the indictment upon which this question arises charges transportation 'for an immoral purpose, to-wit, for the purpose of unlawful co-habitation.' It is a question, therefore, not of the construction of the language of the act, but of the proper interpretation or construction of the indictment. The pleader might have selected any appropriate language to describe the species of immorality intended to be charged, and, having chosen a *legal phrase* for the purpose, *it is to be presumed that it was* employed in its legal sense. In that view, the first part of the instruction is free from serious objection, but it is inaccurate to say that it would be unlawful co-habitation if a man and a woman, being unmarried, simply 'intended to live together' as man and wife, or if the man, having another room, intended repeatedly to visit at the woman's room for the purpose of sexual intercourse. Such intention must be put into actual practice; there must be an actual living together. While it may be true that joint occupancy of the same room is not under all circumstances essential, still it is clear that where the man and woman do not dwell in the same house, and the visitation for sexual intercourse is clandestine, and there is no other association together after the manner of husband and wife, the relation, however immoral and unlawful, does not constitute unlawful co-habitation. (Citing Anderson's Dictionary of Law; Words and Phrases, Vol. 8, p. 7188; Cannon v. United States, 116 U. S. 55, 6 Sup Ct. 278, 29 L. Ed. 561; Turney v. State, 60 Ark. 259, 29 S. W. 893.)"

Furthermore, under the peculiar circumstances of the case at bar, the jury should have been clearly instructed that the fact that the defendant may have been guilty of some offense, or general immoral conduct, other than that charged in the indictment and denounced by the "White-slave traffic Act," should not influence their judgments in considering his guilt or innocence on the charge upon which he was being tried.

What was said by the Court of Appeals of New York, in the now celebrated case of *People v. Becker*, 104 N. E. Rep. 396, 400, is peculiarly pertinent to the case at bar:

"Of course, if this judgment of conviction is to be affirmed, it must be done because the defendant is guilty of murder and *not because he was guilty of 'grafting' or official misconduct, however iniquitous and despicable they may have been.*"

So, in the case at bar, however reprehensible may have been the conduct of the defendant, as disclosed by the record, the jury should have been told that he could be convicted only because he was guilty of a violation of the "White-slave traffic Act," and not because of any general immoral conduct or of his guilt of some offense other than a violation of the "White-slave traffic Act."

Had the indictment, in the case at bar, been more general in its averment of the intent and purpose of the defendant, it may well be that the learned Judge of the Court below would have been justified in refusing to give the instructions requested by us, but, in view of the limitation which the prosecutor saw fit to allege in the indictment, he was bound thereby, and the jury should have been clearly instructed to that effect, and it was reversible error for the trial Judge to refuse the instructions requested by us on this phase of the case.

The requested instructions, which were refused, are as follows:

“You are instructed that the defendant is on trial for the crime charged in the indictment in this case and for no other crime. The law in its wisdom does not undertake to regulate the moral conduct of its subjects, unless the same is declared to be criminal, and even if you find that the defendant’s conduct has been very reprehensible morally, still, if you are not convinced of his guilt beyond all reasonable doubt of the crime charged in the indictment, you should find the defendant not guilty, no matter what your opinion may be of his conduct otherwise.” (Assignment of Error No. 115; Transcript of Record, pp. 90, 403.)

Stuart v. People, 73 Ill. 20.

“You are instructed that when one is said to have taken away a female for the purpose of

concubinage, that means in law that the party charged with such taking away purposed or meant to create a sort of marriage relation between himself and the female; that he purposed to co-habit with her; and to have continual sexual intercourse with her, and if you find from the evidence that this was not his purpose, or if not convinced beyond all reasonable doubt that such was his purpose, it is your duty to find him not guilty.” (Assignment of Error No. 122; Transcript of Record, pp. 93, 406.)

“Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reasonable doubt that he did them, that there existed in his mind the purpose and intent that the said Marsha Warrington should become the mistress and concubine of the said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Marsha Warrington, of concubinage, which is a natural marriage, as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continued illicit cohabitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of the acts alleged in the indictment, you must find a verdict of acquittal.” (Assignment of Error No. 123; Transcript of Record, pp. 94, 406, 407.)

“You are instructed that one, two, or even half a dozen acts of illicit intercourse would

not of themselves constitute concubinage, but there must exist a purpose and intent to have an habitual and continued illicit cohabitation with the woman in question, and you must believe beyond a reasonable doubt, before you can convict the defendant under this indictment that his purpose was that the said Marsha Warrington should be and become his concubine and mistress, and that his purpose was not merely to have illicit sexual intercourse with her; for if his purpose was merely to gratify his desires by rape, seduction or fornication, he would not be guilty under this indictment, and you must acquit him." (Assignment of Error No. 124; Transcript of Record, pp. 94, 95, 407.)

"You are further instructed that defendant is charged with the crime alleged in the indictment in this case, and no other offense. The burden of proving every material allegation of this indictment is upon the prosecution and if they fail to so prove it to your satisfaction beyond all reasonable doubt, it is your duty to acquit, even though you may be satisfied the defendant is guilty of some crime other than that charged." (Assignment of Error No. 125; Transcript of Record, pp. 95, 407.)

"You are instructed that the indictment in this case charges in the first count, that the defendant transported and caused to be transported to Reno, in the State of Nevada, one Marsha Warrington, 'for the purpose of debauchery and for an immoral purpose, to-wit,—that the aforesaid Marsha Warrington should be, and become the concubine and mistress of the said defendant.' In order to convict the defendant upon this count of said indictment it is essential that the prosecution

prove beyond all reasonable doubt, not only that the said Marsha Warrington was transported, but that said transportation was done for the purpose alleged in said indictment, and that such intent or purpose existed in the mind of the defendant at the time of such transportation. And, if you find that the prosecution has failed to prove such purpose to your satisfaction beyond all reasonable doubt, it is your duty to find him not guilty upon this count of said indictment even though you may be satisfied that he had immoral relations with the said Marsha Warrington after such transportation had been accomplished.” (Assignment of Error No. 130; Transcript of Record, pp. 97-98, 412.)

“Evidence has been introduced tending to show that the purpose of defendant in going from Sacramento to Reno in the company of Marsha Warrington was to avoid the notoriety that the defendant expected would result in the publication in a newspaper of certain facts of a scandalous nature. You have the right to consider such evidence as tending to show the intent and purpose of the defendant. If it satisfies your mind that the purpose of the defendant of the alleged transportation of Marsha Warrington was not that charged in the indictment, it will be your duty to return a verdict of not guilty.” (Assignment of Error No. 151; Transcript of Record, pp. 106, 421.)

“The Court instructs the jury that the indictment charges that the purpose of the alleged transportation of Marsha Warrington from Sacramento to Reno was that she should become his mistress and concubine. It is claimed on the part of the defendant that such

was not the purpose, and evidence has been introduced tending to show that reports had been made to defendant that certain facts were to be made public in Sacramento, and that for the purpose of escaping the notoriety that would follow publicity, the defendant intended to leave Sacramento for a brief period, and that it was no part of his purpose to have Marsha Warrington as his concubine and mistress. If you believe that the purpose of the defendant was not as charged in the indictment, it will be your duty to bring in a verdict of not guilty.” (Assignment of Error No. 152; Transcript of Record, pp. 107, 421.)

Furthermore, the charge to the jury, above quoted, is erroneous in another material respect. A defendant in a criminal action testifying in his own behalf is entitled to have his testimony submitted to the jury. The instruction complained of practically informed the jury that they should disregard all the testimony of the defendant touching his reasons for going to Reno—it practically withdrew from the consideration of the jury defendant’s testimony upon the subject of intent.

People v. Keefer, 65 Cal. 232.

This assignment of error, alone, should entitle the defendant to a new trial.

“An instruction which is calculated to confuse and mislead the jury should not be given. And if the instruction of the Court be given,

in terms which may have misled the jury, it is ground for reversal; especially if it appears that they were actually misled.

“Appellate practice—Where the charge of the Judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court.”

7 Encyc. of U. S. Sup. Ct. Repts., tit.
“Instructions,” p. 33, Sec. 9, and
cases cited.

IV.

THE UNDUE PROBATIVE IMPORTANCE PLACED BY THE PROSECUTION AND TRIAL JUDGE UPON THE BLOOD-STAINED SHEET TAKEN FROM THE RENO COTTAGE DISTORTED AND INFLUENCED THE MINDS OF THE JURY TO SUCH AN EXTENT AS TO DEPRIVE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL, AND ALSO CONSTITUTED GROSS MISCONDUCT ON PART OF THE PROSECUTING ATTORNEYS AND THE TRIAL JUDGE.

(Assignments of Error No. 46, 49, 50, 51, 52, Transcript of Record, pp. 63, 64, 65, 207, 209, 219, 221, 222, 229.)

“None but facts having rational probative value are admissible. This principle is, indeed, axiomatic, for any system of evidence purporting to be rational.”

1 Wigmore on Evidence, Sec. 9.

We contend that the admission of the “blood-stained sheet,” and of the testimony relating thereto, was most serious error, and the conduct of the prosecuting officers in this connection inexcusable and deeply prejudicial and injurious to the cause of the defendant.

While the prosecution was putting in its case in chief, it called to the stand a witness, T. A. Reed, the Constable of Reno Township, who, among other things, was permitted by the trial Judge to testify that he had "obtained four sheets which were used upon those beds from a colored woman Emma Pitman, who is in attendance upon the Court here. She brought them out in a package to me at her residence on West Street between Second and Third and I took them to the police station and kept them there until coming here to the Grand Jury, and at that time I turned them over to the office of Mr. McNab. No one interfered with those sheets from the time I got possession of them until I brought them down to the Federal Grand Jury. I had them in a safe place in my office and they were in the same position as they were when I first placed them there. They were continually in my custody during that time, and until I turned them over to the clerk in Mr. McNab's office." (Transcript of Record, p. 218.)

Thereafter John L. McNab, ex-United States Attorney at San Francisco, Earl H. Pier, formerly one of his assistants, and Leslie L. Collins, formerly his chief clerk, were called as witnesses to identify those "blood-stained

sheets” and to testify as to their safe custody from the time they were taken from the bungalow at Reno to the time of their production in court and their introduction in evidence as part of the case of the prosecution.

The witness, T. A. Reed, was then re-called and testified that these sheets and the night gown were bloody. The bloody night-gown was burned up by the colored woman, Emma Pitman. (Transcript of Record, pp. 227-229.) But the witness Reed was very careful to take the blood-stained sheets with him.

After a most painstaking identification of the bloody sheets, Mr. Roche, one of the prosecuting attorneys, offered them in evidence, as follows:

“MR. ROCHE: *We offer these sheets in evidence.*

MR. DEVLIN: We object, first upon the ground that they have not been sufficiently identified, and secondly upon the ground that they are absolutely immaterial, irrelevant and incompetent to any issue in this case.

THE COURT: The objection is overruled.

MR. DEVLIN: We reserve an exception.

MR. ROCHE: *I want to direct the attention of the jury at this time to a part of the sheet.*” (Transcript of Record, p. 229.)

The "part of the sheet" exhibited by the prosecuting attorney to the jury was that containing the discoloration, the "soiled," by which the witness meant "soiled with blood." (See question asked by the trial Judge and answer thereto of the witness J. D. Hillhouse, Chief of Police at Reno; Transcript of Record, p. 208.)

The special prosecutor then made a spectacular demonstration of these sheets to the jury, to convey the impression that one of the girls had been overcome by force, had been raped, and that these sheets were the silent but conclusive evidence of that infamous crime.

It may be well imagined the effect that such a demonstration produced on the jury.

These sheets, it appeared by the testimony of the Government's own witnesses, were absolutely immaterial to any issue in the case, as the marks on them were simply from menstrual flow.

The damaging effect on the jury had been procured, and had been allowed to sink into the minds of the jury, to the injury of the defendant. The special prosecutor, days afterwards when the defense had rested and the impression thus produced had remained with the

jury, during all the time the evidence for the defense was being given to the jury, as shown by the record, said:

“MR. ROCHE: May it please the Court. Your Honor will recollect that we introduced in evidence some of the sheets taken from the bed at Reno, from the bungalow at Reno; examining the testimony recently, I came to the conclusion that there might be some question as to whether we made it clear enough that it was not contended by the Government, that the bloodstains upon the sheets were due to anything except menstrual flow. You understood that Mr. Devlin, did you not?

MR. DEVLIN: No, I did not.

THE COURT: I remember that one of the young ladies testified about that.

MR. ROCHE: We didn't press the matter because it was embarrassing to the witness. I want to say that the Government makes no other contention about it.” (Transcript of Record, p. 336.)

This evidence was not withdrawn and the Court gave the jury no instructions concerning it. It was clearly immaterial and irrelevant to any issue. Owing to the agitation concerning white-slavery and the widely published charges that at least one of the girls had been cruelly outraged it must be evident that the defendant's rights to a fair and impartial trial were practically destroyed by this demonstration.

We assigned the rulings of the Court as error in admitting the evidence. And we now also assign the conduct of the special prosecutor in this matter as misconduct, requiring a new trial.

It is also to be remembered that these sheets were taken from the bed occupied by Lola Norris and it was not claimed that the defendant was connected with them in any way.

We attribute so much importance to this feature of the case that we refer, in detail, to the evidence relating to the "blood-stained sheet."

During the examination of J. D. Hillhouse, Chief of Police of Reno, a witness for the United States, the following proceedings were had:

"Q. Just state to the jury what you observed as to the condition of the clothing in the rear bed-room at that time.

MR. DEVLIN: We object to that, your Honor, upon the ground that it is testifying to a circumstance occurring after the act. The witness says he was not present during the interval of two days and there is no proof that it was in the same condition.

THE COURT: There is nothing in that; it is a question whether the house was in the same condition. If you can show that it was not, then that is a different thing. This witness has

testified sufficiently to indicate that it was in the condition it was in at the time he arrested these people.

MR. DEVLIN: I understood him to say that he did not know.

THE COURT: No, he didn't say anything of the kind. The evidence goes before the jury, you understand, and they will determine the weight to attach to it. Answer the question?

MR. DEVLIN: We note an exception. And it would like to add the further objection that no proper foundation has been laid, and that it does not appear from the witness's testimony that other people were not at the house during the two days that intervened between the two visits.

THE COURT: That only goes to the weight of the testimony, it does not go to its admissibility.

MR. DEVLIN: And furthermore, the facts sought to be elicited are in no wise binding upon the defendant.

THE COURT: It is certainly binding upon the defendant if the jury believes the testimony of the witness. Proceed.

MR. DEVLIN: We take an exception.

A. In the north bed-room, in the clothes closet was a sheet that was soiled with blood-stains.

MR. ROCHE: That is, it was both soiled and had blood-stains?

A. Yes sir.

THE COURT: When you say 'soiled' do you mean soiled with blood?

A. Yes sir. I did not observe any other stains upon the sheet. I did not observe anything the matter with the sheet other than the stains upon it. I also examined the bed to see how many sheets there were upon it. I only saw one,—this was in the bed-room in which Caminetti had gone to dress, and the same room in which Miss Norris went after she left the bath-room. I also observed toilet powder and hair pins upon the bureau. I then proceeded into the south bed-room into which Miss Warrington and Diggs had gone and examined the bed and bedding in that room. I noticed under the pillow a wadded napkin, a soiled wadded napkin, matted together. There were two sheets upon that bed. I did not see any stains on them. I believe the Constable took charge of the sheets of those two beds including the one that was soiled and which I discovered in the closet of the rear bed-room. I noticed toilet powder and hair pins upon the bureau in the south or front bed-room, and in the bottom draw of the bureau I found a night-gown. There were blood stains upon it." (Transcript of Record, pp. 207-208.)

T. A. Reed, Constable of Reno Township, another witness for the United States, testified to the same effect:

"and I made an examination of all the bedding upon the beds; there was only one sheet upon the bed in the rear room, and there were two sheets on the bed in the front or south

room and in the dresser of the front or south room in the lower drawer was a ladies night dress which was rolled up in a wad, and put away in a corner. I undone that and there were blood stains on it, and I simply put it back where I found it. Under the pillow, on the north side of the bed, was a napkin, rolled up, in a wadded condition. I did not examine it or anything. The napkin was in a soiled condition. I do not remember now whether there were any blood stains of any kind upon either one of those two sheets. I was in the house possibly fifteen minutes, and locked up the house when I left and returned to it again on the 16th with Chief Hillhouse. * * * *

Chief Hillhouse got a sheet out of the closet of that bed-room. I did not examine it very close but there were blood stains on it. On that occasion the Chief and I turned the bed back. I did not observe any discoloration of any kind upon either of the two sheets located upon the bed in the front room. I noticed some talcum powder and hair pins in the front bed-room, the next time I visited the cottage must have been long about the 24th or 25th of last month. I obtained four sheets which were used upon those beds from a colored woman, Emma Pitman, who is in attendance upon the Court here. She brought them out in a package to me at her residence on West Street between Second and Third and I took them to the Police Station and kept them there until coming here to the Grand Jury, and at that time I turned them over to the office of Mr. McNab. No one interfered with those sheets from the time I got possession of them until I brought them down to the Federal Grand Jury.

I had them in a safe place in my office and they were in the same position as they were when I first placed them there. They were continually in my custody during that time, and until I turned them over to the clerk in Mr. McNab's office. I don't think Mr. McNab was there at the time—I met him in the corridor. When I took the groceries out of the house I also recall getting the two hats that Diggs referred to as being disguises. The two hats now shown me are the two hats referred to. Said hats were thereupon offered in evidence and marked U. S. Exhibit 15.

MR. ROCHE: Q. Just look at these for a moment please and see if they resemble the sheets which you took from Mrs. Pitman, and subsequently brought down to the Federal Grand Jury and delivered into the custody of one of the young men in Mr. McNab's office?

MR. DEVLIN: I object upon the ground that if the purpose is to identify the sheets they cannot be identified by simply showing whether they resemble something or not—whether they resemble these sheets.

A. They resemble these sheets.

MR. DEVLIN: One moment. I move to strike out the answer of the witness.

THE COURT: The objection is overruled.

MR. ROCHE: Q. Do you notice any difference between the four sheets which you now hold in your possession and the four sheets, the possession of which you obtained from Mrs. Pitman?

MR. DEVLIN: I object to that as leading and suggestive and as cross-examining his own witness.

THE COURT: He is simply asking him if there appeared to be any difference. The objection is overruled.

MR. DEVLIN: We reserve an exception.

A. The sheets were done up in a parcel at the time I received them from Mrs. Pitman, and I did not examine them.

Q. Did you interfere with the condition of the sheets in any manner shape or form from the time you received the sheets from Mrs. Pitman, until they were delivered by you into the custody of the United States Attorney?

MR. DEVLIN: I object to that upon the ground that it does not appear he could make an examination; he did not see them; they were handed to him in a parcel.

THE COURT: The objection is overruled; (To Mr. Roche) But I don't understand this method of anticipating things you never may be called upon to show. Is it because you don't want to keep the witness where, or what is it? (Transcript of Record, pp. 216-219.)

In regard to these sheets, I said I first got possession of them March 19th. I do not know where they were between March 14th and March 19th, they were not in my custody. I testified before that I saw them when I went there with the Chief of Police on the 16th. I beg your pardon. I misunderstood the question. I saw them on March 14th, but did not make a critical examination of them. I saw

them again on March 16th and made no critical examination of them. Between March 16th and March 19th I did not see the sheets and did not know where they were. On March 19th I saw them when they were turned over to me by the colored lady in a bundle. I don't know whether they were washed. I don't think so. On March 19th when I got the sheets from the lady I took them down to the police station, and put them in the office of the Chief: that is in the identification bureau,—the same day. I would go in every day or two and joshingly say to the clerk, 'Is my property alright here,' and he would say 'Yes.' I did not examine them. The next time I saw the sheets and examined them was the present time." (Transcript of Record, pp. 216-220.)

John L. McNab, former District Attorney, a witness for the United States, testified as follows:

"I was formerly United States District Attorney for this District, and am a resident of San Francisco. I remember the witness who preceded me upon the stand when he was brought to San Francisco for the purpose of testifying before the Federal Grand Jury as a witness in this case shortly before the return of the indictment against the defendant. I remember Mr. Reed bringing a bundle of sheets to my office but I don't recall the exact number. I remember some of the sheets particularly.

Q. Do you recall making an examination of the sheets at that time? A. I do.

Q. I call your attention to the sheets which were referred to by the witness who preceded you on the stand, and I ask you to look at those sheets and to state whether those sheets resemble the sheets brought to your office by Mr. Reed upon the occasion to which I have referred.

MR. DEVLIN: I object to the question as to their resembling any particular sheets. The identification should be of those particular sheets and none others.

THE COURT: The objection is overruled.

MR. DEVLIN: We reserve an exception.

A. This one I positively identify as one of the sheets; the other sheets resemble them.

MR. ROCHE: I call your attention to some blood stains appearing upon that sheet and also to some other stains which are yellow in color; I will ask you whether those stains were upon that sheet at the time you examined it in your office.

MR. DEVLIN: I object to that upon the ground that the question implies that the witness knows what is a blood stain. What is a blood stain under these circumstances is a question of scientific knowledge and not a question of ordinary knowledge.

THE COURT: The objection is overruled.

MR. DEVLIN: We take an exception.

A. The same sheet is in the same condition it was in at the time it was brought to my office. I made an examination of each one of those sheets at the time, but I cannot recall

any one particular excepting that one. An identifying mark was placed on several of the sheets by my order. I find the letters "L. L. C.," indicating the initials of the Chief Clerk in the United States Attorney's office. It is in pencil. On the margin,—the clerk would know where he placed it; I don't recall particularly the point at which he placed it. It was Mr. Collins. He put his initials L. L. C. on the margin. I know that he put it on that particular sheet in question, and I think he put it on the others. He will be probably able to point it out to you. The sheets were locked up by Mr. Collins after they were turned over to me in the United States Attorney's office in the vault in the entrance room. I retired from that office on June 24th, 1913, and these sheets were located in the United States Attorney's Office in the vault in the entrance room up to the time I left, and had not been interfered with in any way except by putting the identifying mark on them.

MR. ROCHE: I ask that the clerk mark these sheets for the purpose of identification, 'U. S. Exhibit 16' for identification." (Transcript of Record, pp. 221-223.)

Leslie L. Collins, a witness for the United States, testified:

"I am the Chief Clerk in the United States District Attorney's office for this District. Have been so for four years and over. I remember Mr. Reed when he appeared in the United States District Attorney's office, and brought a bundle consisting of some sheets. I was present when the bundle was delivered into the custody of the United States District

Attorney's office. Mr. McNab instructed me to put it in the office, room 317, which vault I have charge of. I was present at the time the examination of the sheets was made. The sheet marked "U. S. Exhibit 15" for identification and the three other sheets now located at my feet resemble the sheets which Mr. McNab instructed me to put in the safe. I placed a mark upon them, and I find that this sheet is marked by my mark (indicating). This is exhibit 'U. S. 15' for identification. At the time I marked that sheet there was one large blood stain on it. There were three or four other sheets with this one. I don't remember the exact number. Mr. McNab was present at the time I received the sheets and at the time we looked into them. These sheets remained in the safe from that time up to the present time. I have been away from the office since last Friday, and the sheets have not been interfered with that I know of in any way since I placed them in the safe up to this time.

CROSS EXAMINATION.

I am not in the office all the time. I won't say I marked only one sheet. I marked at least three pieces that were in the package. I don't know where I marked them. They were all tied up in a bundle and I marked them on the edge of the bundle. I picked out no particular one. This sheet, the one with the blood spot on it, was taken out. I have no idea what part of the article I marked. It was just the edge of it that I marked. This particular sheet I remember of marking. That was the sheet in question. To the best of my knowledge and belief I never marked the others particularly, I did not pick out any particular

one. The only one I remember particularly marking is the one with the blood stain. I am not an expert but I believe to the best of my knowledge that it was blood stain, but I do not know it. I cannot tell a human blood stain from an animal blood stain. I cannot tell whether the stain was a blood stain or not." (Transcript of Record, pp. 223-224.)

Earle H. Pier, a witness for the United States, testified as follows:

"I am an attorney at law, connected with the United States District Attorney's office in this District. I took these sheets referred to by the witness who preceded me, out of the vault in my room 317 where I found them and brought them into court. They were first taken out of the vault yesterday afternoon. Mr. Roche came to the office and asked for the evidence and I opened the vault and took them out, showed them to Mr. Roche, bundled them up, put them back in the vault and locked them up. They were not interfered with in any way. I placed them back in the vault and brought them here today.

CROSS EXAMINATION.

Mr. Collins was not present when I took them out of the safe yesterday. I know the combination of the safe. Mr. Collins can open it also. Mr. Hettman can also open it. He has recently come into the office. Frequently Mr. Collins would open the safe in the morning and leave it open all day. All I know about these sheets is what I saw the other day. I did not keep guard of them.

RE-DIRECT EXAMINATION.

Until the sheets were taken out by me yesterday I never saw anyone take them out of the safe. The first I knew of the sheets was yesterday. (To Mr. Devlin): My office is an adjoining room. I think yesterday was the first time that I opened that safe for probably three months." (Transcript of Record, pp. 224-225.)

T. A. Reed, re-called, testified:

"I recall this morning testifying about finding a sheet upon which there appeared discoloration upon the day which I and the Chief visited this cottage. I don't remember positively whether it was the Chief or myself who spread that sheet over the foot of the bed in the rear bed-room. In the closet of the rear bed-room.

CROSS EXAMINATION.

By spreading it over the foot of the bed I mean upon taking it out of the closet, to the best of my recollection the Chief simply threw it out on the bed; then in order to look it over more carefully he just spread it over the foot of the bed. This sheet was found in the closet. It was not taken off the bed. I don't remember clearly whether it was the Chief or myself who did this." (Transcript of Record, p. 225.)

Emma Pitman, a witness for the United States, testified in part as follows:

"I noticed two sheets on each bed. The bottom sheet in the north or rear room was spread just as it had been and the other sheet was

thrown on the foot of the bed, back over the foot of the bed. It was badly soiled. The sheet that was marked 'U. S. Exhibit 15' for identification looks very much like the sheet I speak of. I removed the sheet and folded them up. They had never been washed, they appeared to be new sheets. I also went in the front or south bed-room. I did not notice the condition of the sheeting upon that bed. I took them off, they were thrown back on the foot of the bed, both sheets. I took them from the bed, folded them and wrapped them up. I also found in the front or south bed-room a night-gown. It was in the same condition that the sheet was in—bloody. I also found a napkin under one of the pillows, I don't know what condition it was in, I carefully picked it up and put it in the stove. It did not straighten itself out when I picked it up but remained matted. I burned up the bloody night-gown too, and took the sheets home with me, and the Constable came and got them from my house. I don't know the name of the Constable but he was the witness who was here just a moment ago.

Q. Mr. Reed.

A. Mr. Reed. (Witness continuing.) When I delivered the sheets to Mr. Reed they were in the same condition I found them at the house. I had just got home when he got there. That was the last time I saw the sheets until they were shown in this court. I prepared that cottage for occupancy by these parties and cleaned it up before they moved in. There were no old clothes, sheets or pillow slips or anything of

that kind when I finally got through cleaning there.

I took the sheets from that house to my house. When I went up to clean the house my husband told me to bring the sheets to the Washoe County Bank. I did not burn anything else that day. My husband told me to bring the linen to the Bank, and I took them home because I did not want to go through town just as I was at that time, and by the time I got home the Constable was there, so I just turned them over to him, and he gave me an order to give to the Bank that he had the linen, so I didn't see any more of it. It was a written order, I have not got it now. I was to give it to the Bank that he had the linen. That was simply to account to the Bank that he had the linen.

MR. ROCHE: *We offer these sheets in evidence.*

MR. DEVLIN: We object, first upon the ground that they have not been sufficiently identified, and secondly upon the ground that they are absolutely immaterial, irrelevant and incompetent to any issue in this case.

THE COURT: The objection is overruled.

MR. DEVLIN: We reserve an exception.

MR. ROCHE: *I want to direct the attention of the jury at this time to a part of the sheet.*" (Transcript of Record, pp. 227-229.)

Lola Norris, a witness for the United States, testified in part as follows:

"At the time I left that bedroom and went into the bathroom I had a nightgown on. At

that time there was some discoloration on the nightgown. It first appeared to my knowledge on that night. I had become sick the night before the morning on which we were arrested. I first learned that I had become sick that night, when I arose in the morning. I took the nightgown into the front room and told Miss Warrington to put it into the valise. She said it would be better to leave it there. That nightgown was finally left in the front bedroom. I returned to the rear bedroom that morning to complete putting on my wearing apparel. I put one of the sheets into the closet. There was some discoloration upon that sheet.” (Transcript of Record, p. 276.)

After the defendant rested, the following proceedings took place:

“MR. ROCHE: May it please the Court. Your Honor will recall that we introduced in evidence some of the sheets taken from the bed up at Reno, from the Bungalow at Reno; examining the testimony recently I come to the conclusion that there might be some question as to whether we made it clear enough that it was not contended by this Government that the *bloodstains* upon the sheet were due to anything *except menstrual flow*. You understood that, Mr. Devlin, did you not?

MR. DEVLIN: *No, I did not.*

THE COURT: I remember that one of the young ladies testified about that.

MR. ROCHE: We didn't press the matter because it was embarrassing to the witness. I want to say that this Government makes no other contention about it. * * *” Transcript of Record, p. 336.)

This testimony and evidence is absolutely and utterly devoid of any "rational probative value." It is common knowledge that a normal woman is subject to periodical menstrual flow. Of what probative force could the fact that one of these women happened to become sick in Reno have upon the issue in this case? Is it necessary to argue such a self-evident point?

Although the record is silent, nevertheless, to be charitable to the prosecuting attorneys, it undoubtedly was the intention of the prosecution to prove a seduced virgin. But when the victim testified to the facts, the result was disastrous. The damage, however, was done and the prosecution could not then undo the gross error.

We respectfully submit that this evidence and testimony created such an impression upon the minds of the jury as to utterly deprive the defendant of a fair and impartial trial. We respectfully submit, further, that had this evidence and testimony been withdrawn by an instruction of the Court, which was *not* done, even in such case the error of admitting it before the jury would have amounted to reversible error.

Waldron v. Waldron, 156 U. S. 361, 383,
39 L. Ed. 453.

The jury listened to testimony upon the subject from important witnesses. The Chief of Police of Reno, in the role of a mysterious sleuth, dramatically reciting the finding of the blood-stained sheet hidden in the closet of the back bed-room, while the blood covered night-dress was tucked in the corner of the front-room closet. This evidence is very carefully corroborated on behalf of the prosecution by two additional witnesses—one of them another stern officer of the law—the constable of Reno Township. The course of the bloody sheet is carefully and jealously guarded. It is delivered to the officer who receipts for it to the Washoe County Bank; it is guarded at the police station; it is carefully and personally conducted from Reno to San Francisco by an officer of the law; it is delivered into the vaults of the United States District Attorney's office, after having been professionally marked for future identification. It is safely conducted from its vault by an arm of the law to allow the Grand Jury to inspect it. It is again deposited behind bolted locks to await this trial.

Could such a line of conduct by the prosecution have anything but a damaging effect upon a fair and impartial trial? Not even the ridiculous explosion of the seriousness placed upon the materiality of the evidence by the

prosecution could eradicate the false impression created upon the minds of the jury by its illegal admission. But the jury was not instructed that it was not legal evidence. They were told and led to believe that it was material by both the prosecution and the Court.

The course of the prosecution in forcing all this irrelevant and immaterial testimony and evidence, and the rulings of the Court allowing it, to go to the jury were so grossly erroneous as to deprive defendant of a fair and impartial trial. "It is true that in some instances there may be such strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the *original objection may avail on appeal or writ of error*, but such instances are exceptional."

Mr. Justice White, in *Waldron v. Waldron*, *supra*, page 383.

This case will fall within the exceptional instances, as the illegal evidence was not withdrawn. Even though testimony of the condition, in which the Reno cottage was found by the officers, might properly have included the condition of the bed linen, still the undue

stress placed upon the probative importance of this blood-stained sheet could not but inflame the minds of the jury. We respectfully submit that this feature of the case is directly within the doctrine announced by the Supreme Court in the Waldron case, *supra*, where Mr. Justice White says:

“The record which was admitted for a limited purpose had no tendency to establish her guilt of that charge, *if used only for the object for which it was allowed to be introduced.*”

V.

MISCONDUCT OF COUNSEL DURING
THEIR OPENING AND CLOSING AR-
GUMENTS.

(Assignments of Error Nos. 96, 97, 98, 99; Transcript of Record, pp. 80-83, 367, 368, 369.)

If there ever was a case, in which a defendant should have had a fair and impartial trial, this was one.

A great deal of excitement had been aroused by the press and by the sensational resignation of the United States Attorney (Hon. John L. McNab). Special prosecutors had been employed by the Government, and the object seemed to be to convict the defendant at any cost and in violation of those rights which any citizen, charged with crime, is entitled to.

The arguments of the special prosecutors, as the record will disclose, were aimed at creating as much prejudice as possible against the defendant, and to compel the jury to convict the defendant, not on the evidence, but by creating such a feeling of hostility to him, that the jury itself should be put on trial. In a long arguments, the attorneys for the defendant could not interrupt the counsel for the Government at every sentence, but the record

shows plainly the course of conduct pursued by the special prosecutors. We call attention to the record.

The reason why the prosecution was so anxious to secure a conviction, as appears by these assignments of misconduct, is expressed in counsel's opening argument to the jury, and to which we duly excepted.

“MR. ROCHE: *The eyes of not only the people of the State of California are upon you, gentlemen of the jury, awaiting your verdict in this case, but the people of all these United States. 60,000,000 or 90,000,000 people, are awaiting your verdict in this case.*

MR. DEVLIN: I object to that, your Honor. I object to any appeal that ninety million people are awaiting for this verdict. I assign the language of the attorney as misconduct.

THE COURT: *That is merely a form of speech.* Confine yourself to the evidence, Mr. Roche.” (Assignment of Error No. 96; Transcript of Record, pp. 80, 367.)

In the course of the closing argument on behalf of the Government, Hon. Matt I. Sullivan also permitted himself to make intemperate remarks to the jury, which were allowed and approved by the Court, and which were highly injurious and prejudicial to the defendant.

“MR. SULLIVAN: Well here, gentlemen, in brief, *are the admitted facts*: up to the time he got her drunk with champagne that girl was pure and undefiled——

MR. COGHLAN: We take an exception to that. *The Court ruled against us in introducing testimony of that kind.*

MR. SULLIVAN: Well, I am very sorry that the defendant *seduced the girl.*

THE COURT: There has been no offer of such evidence.

MR. COGHLAN: *Your Honor confined me time and again, fearing that I was about to go without the boundary, fearing that I was about to bring in testimony——*

THE COURT: The bars were absolutely thrown down by the prosecution for the introduction of any evidence as to previous acts of this girl with anybody.

MR. COGHLAN: *Your Honor's rulings are in the record. Your Honor confined me——*

THE COURT: Mr. Coghlan, I must ask you to recur in your memory to what transpired. I simply hold that under this Act it makes absolutely no difference, so far as the guilt of a defendant is concerned, what the previous character of the woman was; but when it came to the question as to whether this was the first act of illicit intercourse of this girl the very fact that she testified that it was the first act threw down the bars to you to introduce any evidence as to previous acts.

MR. COGHLAN: *Your Honor will remember this,——*

THE COURT: I don't care to discuss it any further.

MR. COGHLAN: *We take an exception.*" (Assignment of Error No. 97; Transcript of Record, pp. 80-81, 367, 368.)

Upon another occasion, in the course of his closing argument to the jury, Mr. Sullivan used the following highly inflammatory and uncalled-for language:

"MR. SULLIVAN: Gentlemen, if there is any depraved man in the world, if there is any man who has sunk to the uttermost depths of depravity, it is that man in form, because he is a man in form alone, who seduces an innocent girl and then exposes her shame to the world. If he had one redeeming trait of character in his composition, having blasted the life of that virgin, he ought to be willing to take fifty years in the penitentiary before he would come before a jury of his fellow citizens and before the world, and say yes, I seduced that girl, before he would come before a jury of his fellow citizens and recount time after time when he had illicit intercourse with this girl. A decent man would die first.

MR. DEVLIN: If your Honor please, I except to that because no such language came from the defendant; it all came from Marsha Warrington.

MR. ROCHE: It came from Marsha Warrington upon your cross-examination for the first time.

MR. DEVLIN: We had a right to cross examine her.

THE COURT: Mr. Sullivan, confine yourself to the evidence; don't transgress it." (Assignment of Error No. 98; Transcript of Record, pp. 81-82, 368-369.)

Again, upon another occasion, Mr. Sullivan committed a most serious error, as follows:

"MR. SULLIVAN: Counsel for the defense, prompted by the defendant, put these questions to Marsha Warrington.

MR. COGHLAN: We take an exception to the statement of counsel that at the suggestion of the defendant anything was done." (Assignment of Error No. 99; Transcript of Record, pp. 82, 369.)

We submit that these remarks and argument were entirely too inflammatory, harsh and severe, and were, clearly, employed to influence and sway the jurors by passion, and, also, to intimidate them. They were not justified by any evidence in the case.

People v. Hail, Vol. 19, Cal. App. Dec. 298, 309 et seq. and many cases there cited;

Wells v. State, 145 S. W. 950;

Wilson v. State, 128 N. W. 38;

People v. Crosby, 17 Cal. App. 518;

People v. Burke, 145 Pac. 950;

Collins v. State, 145 S. W. 1065;

Collins v. State, 56 So. 527;

Parker v. State, 75 So. 437;

Com. v. Nicely, 130 Pa. 261, 18 Atl. 737;

Watson v. State, 7 Okl. Cr. 590, 124 Pac. 1101;

Williams v. U. S. 168 U. S. 382;

Hall v. U. S., 150 U. S. 76;
 Graves v. U. S., 150 U. S. 118;
 People v. Warr, 136 Pac. 304;
 Brailaford v. State, 158 S. W. 541;
 Miller v. State, 69 S. E. 922;
 Territory v. Cordova, 11 N. M. 367, 68
 Pac. 919;
 State v. Blackman, 108 La. Ann. 121, 32
 So. 334;
 People v. Bissert, 172 N. W. 634;
 Ward v. State, 77 Ark. 19, 90 S. W. 619;
 Ivey v. State, 54 L. R. A. 459;
 State v. Proctor, 86 Iowa, 699.

It would prolong to an unpardonable length this lengthy brief, to refer in detail to the very many authorities, both in the Federal and State courts, holding that remarks of prosecuting officers, similar to those employed in the case at bar, constitute misconduct and reversible errors, and that the actions of the trial Judge, in not checking or reproving the prosecuting officers and in not instructing the jury to disregard the improper remarks and arguments, are equally reprehensible and erroneous. We content ourselves with a reference to but a few of the leading authorities on this subject.

In the well considered case of *People v. Hail*, Vol. 19, Cal. App. Dec. 298, 309 et seq., where quite a number of authorities are considered, it appeared that, in the course of his argument

to the jury, the district attorney said: "Men have been acquitted who have committed cold blooded murder, *and if you were to acquit this man under the testimony here* you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go *un-whipt of justice*; gentlemen, you cannot do it, you will not do it. *Should you do it you would be afraid to go out on the street and meet your fellow-men.*"

These remarks of the prosecuting attorney, in the case cited, are upon a par with the remarks of the prosecuting attorneys in the case at bar, both in their opening and closing arguments, as above set forth in this Opening Brief. They have but to be compared to appreciate their substantial similarity, especially those portions italicized by us on pages 139-140 of this Opening Brief.

The trial Court, in the case cited, refused or omitted to check or reprove the prosecuting attorney, or to instruct the jury to disregard the remarks, saying: "I don't understand it; to me it doesn't mean anything; *Proceed.*" (Vol. 19 Cal. App. Dec. p. 309.)

The trial Judge, in the case at bar, not only refused to check or reprove the prosecuting attorneys in their highly improper remarks to the jury, but, on the contrary, approved of them, stating on one occasion: "*That is*

merely a form of speech.” (Assignment of Error No. 96; Transcript of Record, pp. 80, 367.)

Again, on another occasion, stating, in reply to a protest from counsel for the defendant: *“I don’t care to discuss it any further.”* (Assignment of Error No. 97; Transcript of Record, pp. 80-81, 367, 368.)

Addressing ourselves particularly to the remarks and arguments of the prosecuting attorneys covered by Assignments of Errors Nos. 96, 97 and 98, we submit that they clearly show the applicability, to the case at bar, of the language of the District Court of Appeal of California in the case cited of *People v. Hail*, *supra*. That Court said:

“That the effect of the statement that the jurors, in the event that they acquitted the defendant, would be afraid to go out upon the public streets and meet their fellow-men, was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence, cannot for a moment be doubted. Whether the language referred to was used in good faith or for the purpose of influencing a verdict, is immaterial. The vice and damaging effect of the utterance upon the rights of the accused remained. In a case where evidence of guilt was overwhelming or conclusive, we might justly say that the language was not prejudicial in its effect upon the legal rights of the defendant, although the

use of such language would in such case be none the less reprehensible. But this is, as we have shown, not such a case." (19 Cal. App. Dec. p. 310; italics ours.)

So, in the case at bar, the language of the prosecuting attorneys was calculated "to intimidate or influence them (the jury) to return a verdict of conviction, regardless of their views as to the effect of the evidence." It matters not, as pointed out by the District Court of Appeal, in the passage just quoted, that the "language referred to was used in good faith or for the purpose of influencing a verdict."

The District Court of Appeal, in the case of *People v. Hail*, *supra*, further says:

"The language complained of amounts, substantially, to a direct declaration to the jury that, if they did not convict the defendant, they would lose the respect and confidence of their friends and neighbors. Thus the question of the honesty and the integrity of the jury was injected into the case. In other words, the jurors themselves were put upon trial by the district attorney, and whether they could bravely meet their fellow-citizens and face them with clear consciences was made by that official to depend upon whether they found the defendant guilty."

(3) A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because

he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means. That official should always do his sworn duty, of course, but he should always do it fairly and justly and not permit the great power with which he is clothed to be converted into an instrument of persecution. He should, as indeed, any lawyer should, in his address to a jury, *remain strictly within the record and not attempt to evolve any theory or to import into the case any feature not fairly and reasonably justified by the proofs.* * * * * *

The cases are replete with severe arraignments of prosecuting officers for unfairness in the presentation of cases against persons accused of crime, and there have been very justly recorded many reversals for misconduct no more obnoxious than that complained of in the case at bar. The number of such cases is so large that it would greatly extend the length of this opinion—now more extended than had been desired—to attempt to notice all of them. We shall examine a few of them, however.” (19 Cal. App. Dec. 310, 311.)

The District Court of Appeal then proceeds to consider and to quote liberally from the following authorities:

People v. Bowers, 79 Cal. 415;
 People v. Ah Lean, 92 Cal. 282;
 Tucker v. Henniker, 41 N. H. 319;
 People v. Mull, 50 N. E. 629;

which are also applicable to the case at bar and support the contentions we make in this regard.

The District Court of Appeal then proceeds and concludes as follows:

“Thus we have presented excerpts from a few of the cases upon the proposition under review, not for the reason that it is not clear in principle that reversals should be ordered where public prosecutors resort to the practice of bringing into their cases *under the guise of argument or otherwise matters wholly outside the records and which are obviously calculated to influence juries, either consciously or unconsciously, in arriving at verdicts of guilty, contrary to the evidence and the law*, but to show how such practice is uniformly condemned in strong language by the higher courts.

There are innumerable other cases in which similar views are expressed and like conclusions reached, and the practice referred to severely and justly condemned. It is not necessary here to review those cases, but among them the following will be found to be cogently applicable to the case at bar and instructive upon the question in hand: *People v. Fielding*, 158 N. Y. 542, 53 N. E. 496; *People v. Butler*, 8 Cal. 463; *Vickers v. United States*, 98 Pac. 467, 473; *State v. Kauffman*, 118 N. W. 337; *State v. Underwood*, 77 N. C. 502; *State v. Robert*, 131 Mo. 328; *People v. Devine*, 95 Cal. 231; *People v. Chew Bock Hue*, 18 Cal. App. Dec. 634; *People v. Fleming*, 166 Cal. 357; *People v. Tufts*, 47 Cal. Dec. 277.”

In the case of *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101, it appeared that the district attorney, in his closing argument to the jury, used the following language:

“He (defendant) is guilty of murder and he ought to suffer for it. *The people in this courtroom are here DEMANDING that justice be meted out to this defendant and I know that you will do it when you retire to deliberate upon your verdict in the jury room.*”

The Court, in reversing the conviction, quoted the following language from *Cox v. State*, 2 Okl. Cr. 668:

“The authorities are numerous as to what constitutes improper conduct. They are uniform in holding any statement improper that is calculated to inflame the minds of the jurors, arouse their prejudice or appeal to their passions.”

The language of this latter decision, and that of *People v. Hail*, *supra*, are peculiarly applicable to the remarks of the prosecuting attorneys in the case at bar, when they said:

“MR. ROCHE: The eyes of not only the people of the State of California are upon you, gentlemen of the jury, awaiting your verdict in this case, but the people of all these United States. 60,000,000 or 90,000,000 people, are awaiting your verdict in this case.” (Transcript of Record, p. 367; Assignment of Error No. 96.)

If it was reversible error for the prosecuting attorney to say to the jury: “Should you do

it (acquit the defendant) you would be afraid to go out on the street and meet your fellow-men," as was said in the case of *People v. Hail*, supra, it was equally reversible error for the prosecuting attorney, in the case at bar, to say to the jury: "The eyes of not only the people of the State of California are upon you, gentlemen of the jury, awaiting your verdict in this case, but the people of all these United States. 60,000,000 or 90,000,000 people, are awaiting your verdict in this case."

We submit that if it was improper for a prosecuting attorney so to argue to a jury as to impress them that a verdict of acquittal would lose the respect and confidence of their friends and neighbors, a limited number of people, it is incalculably more prejudicial and harmful to appeal to a jury, as was done in the case at bar, substantially telling them that an acquittal of the defendant would lose the respect and confidence of "not only the people of the State of California," "but the people of all these United States," "60,000,000 or 90,000,000 people are awaiting your verdict in this case."

The trial Judge attempted to palliate this portion of counsel's exhortation with an air of nonchalance and lightly dismissed the trite apostrophe as a "mere form of speech."

While this oral figure of speech, forged from the febrile memory of a rabid prosecutor, was neither original or justifiable, yet its miasma was spread before the jury, and the intention to poison their minds completely accomplished. Against the vigorous protests of defendant's counsel, but most unavailingly, the trial Judge thus permitted the prosecuting attorneys to soar upon the wings of verbosity and out-Herod Herod in their blood-curdling anathemas, bodied forth from an untrammelled imagination and utterly outside the evidence before the jury. We are unable to agree with the trial Judge's view that the passionate appeal of Mr. Roche, in referring to the 60,000,000 or 90,000,000 people awaiting the jurors' verdict in this case, or the severe invective of Mr. Sullivan, was a "mere form of speech." Their language was most inflammatory and was undoubtedly intended to sway and influence the jurors by passion, if not intimidation.

The defendant was tried by special counsel, appointed specially to represent the United States by reason of their standing at the bar and by reason of their leading professional qualifications.

It is therefore surprising that we are compelled to assign as error the gross misconduct

above set out. The fact that from sixty to ninety million people, to say nothing of the people of California, were desirous of having the defendant punished, as stated to the jury, should have inspired a more judicial temperament in the prosecution than counsel exhibited. We think that counsel misunderstood our people. We submit that the people of the United States are fair minded and prefer justice to tyranny. We submit, further, that our people would prefer the setting at liberty of ten criminals rather than the persecution of one innocent man. But counsel failed to view public opinion in that light. Counsel were impressed with but the one idea—conviction—and allowed it to conquer their better judgment. They misconceived their duty. It is just as important in the administration of justice that the prosecutor keep within the limits of the law as it is for the defense. Prosecutors should subordinate their ambition to justice. The qualification of counsel as public prosecutors was not the issue before the court or before the people.

When, therefore, we consider the personnel of the prosecution, the assignments of misconduct stand forth with glaring boldness. Had defendant been guilty as charged, an ideal jury had been sworn and would have so found *after*

an impartial trial. It was not necessary for counsel to resort to unfair tactics in order to secure a conviction in any event.

Furthermore, the arguments employed by Mr. Sullivan, in his closing argument: "Well here, gentlemen, in brief, are the *admitted facts*: up to the time he got her drunk with champagne that girl was pure and unde-
 filed——" * * * "Well, I am very sorry that the defendant seduced the girl." (Transcript of Record, pp. 367, 368.)
 * * * * *

"Gentlemen, if there is any depraved man in the world, if there is any man who has sunk to the uttermost depths of depravity, it is that man in form, because he is a man in form alone, who seduces an innocent girl and then exposes her shame to the world. If he had one redeeming trait of character in his composition, having blasted the life of that virgin, he ought to be willing to take fifty years in the penitentiary before he would come before a jury of his fellow citizens and recount time after time when he had illicit intercourse with this girl. A decent man would die first" (Transcript of Record, pp. 368, 369), come clearly within the rule laid down in the cases above cited.

If it was reversible error for the prosecuting attorney to say to the jury: "Men have been acquitted who have committed cold-blooded murder, *and if you were to acquit this man under the testimony here you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go unwhipt of*

justice; gentlemen, you cannot do it, you will not do it," as was said in the case of *People v. Hail*, *supra*, it was equally reversible error for the prosecuting attorney, in the case at bar, to use the language referred to above.

If it was reversible error to argue to a jury: "He (defendant) is guilty of murder and he ought to suffer for it. The people in this courtroom are here DEMANDING that justice be meted out to this defendant and I know that you will do it when you retire to deliberate upon your verdict in the jury room," as was said in the case of *Watson v. State*, *supra*, it was equally reversible error for the prosecuting attorney (Mr. Roche), in the case at bar, to argue as above set forth.

In the case of *Collins v. State*, 148 S. W. 1065, the prosecuting officer, in his argument to the jury, where the defendant was charged with an assault with an intent to commit rape, said: "If you don't convict the defendant in this case, there is no use for the grand jury of your county to hereafter indict any man for the detestable crime of assault with intent to commit rape in your county." These remarks were considered improper but unavailing to defendant for reversal in view of the trial court's instruction to the jury that they were improper and to disregard them.

In *Com. v. Nicely*, 130 Pa. 261, 18 Atl. 737, the Supreme Court of Pennsylvania said, in

commenting upon the duty of a prosecuting officer: "He should act impartially. He should present the commonwealth case fairly, and should not press upon the jury any deduction from the evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appeal to their prejudices he is no longer an impartial officer, but becomes a heated partisan."

In the case of *Williams v. U. S.*, 168 U. S. 382, on the trial of an immigration inspector for extortion, the prosecuting officer remarked in the presence of the jury, that, "No doubt every Chinese woman who did not pay defendant was sent back" (to China). The overruling of defendant's objection to the remark was held to be error and the case was reversed on this, among other, grounds.

In the case of *Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919, a statement employed by the prosecutor in addressing the jury: "The verdict of the people and the community is that the defendant is guilty," was held to be an improper and prejudicial expression, demanding a rebuke from the trial court.

In the case of *State v. Blackman*, 108 La. Ann., 32 So. 334, the statement made by the prosecuting attorney in his closing argument: "If there is a man on the jury who does not believe this man ought to be hung, then he is

unfit to sit on the jury," was held to be prejudicial misconduct and cause for reversal.

The language used by the Court of Appeals of New York, in the leading case of *People v. Becker*, 104 N. E. 396, 403, is applicable to the remarks and argument of the prosecuting attorneys in the case at bar. The Court of Appeals of New York said:

"In opening the case, notwithstanding the strenuous objections and exceptions of defendant's counsel, the district attorney committed the serious error of making many statements either in words or to the effect that Becker was a 'grafter,' and was collecting blackmail and protection money from gambling houses; that as time went on he became more avaricious and bold and that his power became generally recognized by keepers of illegitimate resorts; that he accumulated large sums of money; that he had graft relations with gamblers; that he was a 'cool, calm, calculating, grafting police officer;' and that he used his office for the protection of 'his traffic in the purchase and sale of law enforcement.' It will be noted that his statements were not confined to his alleged relations with Rosenthal preceding, and as claimed by the people, leading up to the conspiracy to murder the latter, but were directed to Becker's alleged general misconduct and corruption in no manner connected with the alleged crime for which he was being tried. Sometimes the court stated rather mildly in answer to the defendant's request that the jury be instructed to disregard the statements of the district attorney, that he did

not see how they were relevant; sometimes the objection was overruled altogether; sometimes he directed that the word 'grafting' be left out; sometimes he sharply criticised the defendant's attorney for entering objections to the statements as they were made.

It could not, of course, be competent and proper for the prosecution to show as part of its case that Becker had been guilty of general corrupt conduct having no possible relation to the present crime. He was on trial for murder and not general official misconduct and corruption. And equally there can be no doubt about the very prejudicial character of these statements. In its quest for motive the people's entire theory of defendant's guilt rests on the theory of 'graft' in connection with Rosenthal, and the repeated statements to the effect that Becker's misconduct was not confined to Rosenthal but was habitual and flagrant necessarily must have inflamed the minds of the jury. They present no vexed or uncertain question of error. While the courts are, as they should be, ready to make due allowance for some inadvertent slip made by zealous counsel in the heat and struggle of a bitterly contested trial, that consideration, of course, does not apply to the presiding judge, and no case will be found where there has been overlooked the failure or refusal of the trial court in a desperate case like this to correct and check such important and repeated errors as these were. (Citing *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Conrow*, 200 N. Y. 356, 369, 93 N. E. 943.)"

This language of the Court of Appeal of New York would seem to be peculiarly applicable to the following situation in the case at bar disclosed by the record:

“MR. SULLIVAN: Well here, gentlemen, in brief, are the *admitted facts*: up to the time he got her drunk with champagne that girl was pure and undefiled——

MR. COGHLAN: We take an exception to that. The Court ruled against us introducing testimony of that kind.

MR. SULLIVAN: Well, I am very sorry that the defendant seduced the girl.

THE COURT: There has been no offer of such evidence.

MR. COGHLAN: Your Honor confined me time and again, fearing that I was about to go without the boundary, fearing that I was about to bring in testimony——

THE COURT: The bars were absolutely thrown down by the prosecution for the introduction of any evidence as to previous acts of this girl with anybody.

MR. COGHLAN: Your Honor's rulings are in the record. Your Honor confined me——

THE COURT: Mr. Coghlan, I must ask you to recur in your memory to what transpired. I simply hold that under this act it makes absolutely no difference, so far as the guilt of a defendant is concerned, what the previous character of the woman was; but when it came to the question as to whether this was the first act of illicit intercourse of this girl the very

fact that she testified that it was the first act threw down the bars to you to introduce any evidence as to previous acts.

MR. COGHLAN: Your Honor will remember this,——

THE COURT: I don't care to discuss it any further.

MR. COGHLAN: We take an exception." (Assignment of Error No. 97; Transcript of Record, pp. 80, 368.)

As we have shown elsewhere in this Opening Brief, under subdivision IV, the defendant was not charged with seduction, nor was the seduction of the woman comprehended within the issue. He was charged and convicted, under the first four counts of the indictment, with having transported Marsha Warrington and Lola Norris with the intent and purpose that they should become the concubines and mistresses of himself and Caminetti respectively.

Nevertheless, the prosecuting attorneys very artfully brought the subject before the jury over our objections.

"MR. SULLIVAN: Well here, gentlemen, in brief, are the admitted facts: up to the time he got her drunk with champagne that girl was pure and undefiled——

MR. COGHLAN: We take an exception to that. The Court ruled against us in introducing testimony of that kind.

MR. SULLIVAN: Well, I am very sorry that the defendant seduced the girl." (Transcript of Record, pp. 367-368.)

The remarks of the trial Judge, upon the occasion just referred to, were equally damaging to the defendant. In answer to the statement of Mr. Coghlan that: "*The Court ruled against us in introducing testimony of that kind,*" (Transcript of Record, p. 368), meaning thereby that the trial Judge had denied the defendant the right to show that Marsha Warrington had had sexual intercourse with men other than the defendant at and previous to the time of the first act of sexual intercourse, which she testified she had had with the defendant (Transcript of Record, p. 258), the trial Court stated, in the presence of the jury: "*There has been no offer of such evidence.*" To this, Mr. Coghlan replied: "*Your Honor confined me time and again, fearing that I was about to go without the boundary, fearing that I was about to bring in testimony——.*" The trial Judge answered this statement of counsel for the defendant by stating, in the presence of the jury: "*The bars were absolutely thrown down by the prosecution for the introduction of any evidence as to previous acts of this girl with anybody.*" To this statement of the trial Judge, Mr. Cog-

lan ventured the statement: "*Your Honor's rulings are in the record, your Honor confined me——.*" Thereupon, the trial Judge stated: "Mr. Coghlan, I must ask you to recur to your memory to what transpired. I simply hold that under this act it makes absolutely no difference, so far as the guilt of a defendant is concerned, what the previous character of the woman was; *but when it came to the question as to whether this was the first act of illicit intercourse of this girl the very fact that she testified that it was the first act threw down the bars to you to introduce any evidence as to previous acts.*" Mr. Coghlan then attempted to state: "*Your Honor will remember this.——*" but the trial Judge interrupted with the statement: "*I don't care to discuss it any further,*" whereupon Mr. Coghlan replied: "*We take an exception.*"

A reading of the record does not bear out the trial Judge in his statements to counsel, in the presence of the jury, that: "There has been no offer of such evidence;" "The bars were absolutely thrown down by the prosecution for the introduction of any evidence as to previous acts of this girl with anybody."

The Transcript of Record shows that the trial Judge expressly ruled out any such evidence, stating, on one occasion: "*The relations of this woman with any other person than the defendant is something that is wholly immaterial to the case so far as its present aspect is concerned;*" and again, on another occasion, stating: "You may show, if you see fit to

make the effort and if you can, that this woman was a public prostitute, *but you cannot show individual instances outside of the relations with this defendant.*" (Transcript of Record, p. 245.)

We set out exactly what transpired, as disclosed by the Transcript of Record:

"Q. I call your attention to November 26th, Miss Warrington—Thanksgiving day—and I will ask you if upon that day you went to the football game between Stanford and Berkeley in San Francisco?

A. I did.

Q. Did you go around in San Francisco on the night after the game?

MR. ROCHE: That is objected to as being immaterial, irrelevant and incompetent, not proper cross examination and upon the additional ground that the question does not indicate that the witness was with the defendant.

MR. COGHLAN: I am fixing a date.

THE COURT: What is the purpose of it?

MR. COGHLAN: What I wish to show, if the Court please, is that this young woman went down to that football game, that she came down with a certain Albert Putnam——

THE WITNESS: (Int'g.) No, I did not.

MR. ROCHE: I will withdraw the objection, if your Honor please, in view of the statement just made by counsel.

THE COURT: The relations of this woman with any other person than the defendant is

something that is wholly *immaterial* to the case so far as its present aspect is concerned.

MR. COGHLAN: I think that is true, your Honor.

THE COURT: Confine yourself to the cross examination of this witness.

MR. COGHLAN: I desire to ask your Honor if you will not permit me to show the familiarity of this young woman with the night life of San Francisco, not to discredit her, but in order to show that it would have been unreasonable that she would have been persuaded, induced or enticed away from the State of California for the purposes that the indictment alleges.

THE COURT: You may show, if you see fit to make the effort and if you can, that this woman is a public prostitute, *but you cannot show individual instances outside of the relations with this defendant.*

MR. COGHLAN: Your Honor's holding is under the Hoke case, is it?

THE COURT: Exactly.

MR. COGHLAN: Upon the question I have attempted to propound, if the Court please, I desire to reserve an exception." (Assignment of Error No. 59; Transcript of Record, pp. 67, 245.)

A reading of the above forces us to the conclusion that the trial Judge was mistaken in the comments he made during the closing argument of Mr. Sullivan, in which he supported

the latter and repressed and reproved Mr. Coghlan, one of the attorneys for the defendant.

It will not be contended for a moment that the concession, made by the trial Judge, to the attorneys for the defendant, permitting them to show, "if you see fit to make the effort and if you can, that this woman is a public prostitute," was of any efficacy at all or subserved any purpose whatever. The attorneys for the defendant did not desire to, and could not if they wished, prove that Marsha Warrington was a "public prostitute." But, manifestly, it is one thing to prove that a woman is a "public prostitute," and quite another thing to show "individual instances" of sexual intercourse with persons other than the defendant and previous to her first act of intercourse with the defendant. The trial Judge, while liberal in his permission to the attorneys for the defendant to prove Marsha Warrington a "public prostitute," was entirely in error in holding that "you cannot show individual instances outside of the relations with this defendant." It must be obvious, from a mere reading of the record, that the trial Judge was incorrect in his ruling, if not positively unfair.

The Hoke case (Hoke v. United States, 227 U. S. 208, 57 L. Ed. 523), to which the trial Judge referred, in support of the ruling he made that the attorneys for the defendant could show Marsha Warrington to be a public prostitute, *but could not show individual instances outside of her relations with the defendant, does not support any such view of the law.* (Transcript of Record, p. 245.)

All that the Supreme Court of the United States said, in the Hoke case, on that subject, was as follows: "Defendants complain that they were not permitted to show that the women named in the indictment were public prostitutes in New Orleans. Such proof, they contend, was relevant upon the charge of persuasion or enticement. This may be admitted, *but there was sufficient evidence, as the Court said, of the fact of the immorality of their lives, and explicitly ruled that they could be shown to be public prostitutes. The Court, however, excluded certain details sought to be proved. Under the circumstances there was no error in the ruling.*"

It is respectfully submitted that there is nothing in the Hoke case which justified the trial Judge in his ruling that Marsha Warrington could be shown to be a "public prostitute," *but that you could not also show individual instances of sexual intercourse with men other than the defendant and previous to*

the time of her alleged first act of sexual intercourse with the defendant.

In this connection, we respectfully suggest that if anything is well settled in the domain of criminal law, it is that the previous unchaste character of a female pretending to have been seduced or raped is admissible in evidence. "Chastity may, and generally must, be attacked by evidence of specific acts of unchastity and immorality, unless they are too remote; and her declarations and admissions are admissible for this purpose. It may be shown that she is guilty of lewd and improper conduct, not amounting to sexual intercourse, with other men; that she had intercourse with defendant before the promise; and that she was often out late at night."

Vol. 35 CYC and cases there cited.

It is obvious that during the closing argument of Mr. Sullivan, the trial Judge attempted to correct and rectify his erroneous ruling and announced, in the presence of the jury, in replying to the statement of one of the attorneys for the defendant (Mr. Coghlan) when the latter said: "The court ruled against us in introducing testimony of that kind;" (The Court) "There has been no offer of such evidence;" and again: "The bars were abso-

lutely thrown down by the prosecution for the introduction of any evidence as to previous acts of this girl with anybody."

But the record discloses clearly the inconsistency and error of his rulings. He first rules that the efforts of the defendant, in proving the character of Marsha Warrington, are limited, under the Hoke case, solely to that of being a "public prostitute," and that "the relations of this woman with any other person than the defendant is something that is wholly immaterial to the case," "you cannot show individual instances outside of the relations with this defendant." (Transcript of Record, p. 245.) He then rules, upon the closing argument of Mr. Sullivan, just to the contrary. (Transcript of Record, p. 368.)

Furthermore, his statements, in the presence of the jury, upon the closing argument of Mr. Sullivan, that "there has been no offer of such evidence," and again: "The bars were absolutely thrown down by the prosecution for the introduction of any evidence as to previous acts of this girl with anybody," were most harmful to the defendant, in that they directly informed the jury that counsel for defendant had had an opportunity to introduce evidence "as to previous acts of this girl with anybody,"

and had failed to do so, plainly intimating to the jury that the defendant was not able to prove any previous acts of Marsha Warrington with anyone, otherwise he would have done so.

The record further shows that the trial Court expressly ruled that "the relations of this woman with any other person than the defendant is something that is wholly immaterial to the case," in spite of the fact that Mr. Roche, one of the prosecuting attorneys, had just previously stated to the trial Court: "I will withdraw the objection, if your Honor please, in view of the statement just made by counsel." (Transcript of Record, p. 245.)

It is also true that Mr. Coghlan, one of the attorneys for the defendant, after the trial Court had stated that: "The relations of this woman with any other person than the defendant is something wholly immaterial to the case so far as its present aspect is concerned," said: "I think that is true, your Honor," but almost immediately thereafter and after the trial Court had said: "You may show, if you see fit to make the effort and if you can, that this woman is a public prostitute, but you cannot show individual instances outside of the relations with this defendant," said: "Your

Honor's holding is under the Hoke case, is it?" to which the Court replied: "Exactly;" thereupon Mr. Coghlan stated: "Upon the question I have attempted to propound, if the Court please, I desire to reserve an exception." (Assignment of Error No. 59; Transcript of Record, pp. 67, 245.)

The baneful and pernicious effects of the rulings and remarks of the trial Judge, as well as the argument of the prosecuting attorneys, upon this phase of the case, can hardly be overestimated and, we respectfully submit, must have deeply prejudiced the defendant, and constituted serious and reversible error entitling the defendant to a new trial.

Again, there is another aspect of the argument made by Mr. Sullivan to the jury, which constituted undoubted error, and that is the statement, with the sanction and approval of the trial Court: "Well here, gentlemen, in brief, *are the admitted facts*: up to the time he got her drunk with champagne that girl was pure and undefiled——" (Transcript of Record, pp. 367, 368.)

By this statement, alluding to the "admitted facts," the prosecuting attorney was arguing to the jury that, because the defendant had taken the stand and had not specifically and

categorically denied this and other matters, they were deemed to be “admitted facts.” It is to be observed that this argument of the prosecuting attorney was in keeping with the trial Judge’s instructions to the jury: “*But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration.*” * * * * *

“And if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; *SINCE IT IS A LEGITIMATE INFERENCE THAT, COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM, HE WOULD HAVE DONE SO.*” Transcript of Record, pp. 390, 391.)

We have already, at great length, fully presented our views that the above instructions did not state correct principles of law and were misleading, and we beg to refer to the argument there presented, under subdivision I of this Opening Brief, since it is obvious that if it was reversible error for the trial Judge to instruct the jury as he did, it was equally reversible error to permit the prosecuting attorney to make the comments he did.

"It is reversible error for the prosecuting attorney in his argument to the jury to assert facts and circumstances as being in the case which are not shown by the evidence, or to comment upon such facts, or to draw inferences from them unfavorable to the accused. Some allowance, however, is made for the extravagance or imagination of the prosecuting attorney, and a *slight* deviation from the record may be overlooked *if the accused is not prejudiced thereby.*"

CYC. Vol. 12, p. 574, and cases there collated.

It is respectfully submitted that the "deviation from the record," in the case at bar, was much more than "slight;" it was a marked and substantial deviation and wilful misstatement to the jury of an important fact which, if the jury believed the prosecuting attorney's statement of fact, as we must assume that it did, was bound to prejudice the defendant.

Furthermore, as aptly stated by the United States Supreme Court in the case of *Hail v. U. S.*, 150 U. S. p. 76, 82: "The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, *gave the jury to understand that they might properly and lawfully be influenced by it*; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been

duly excepted to, entitled him to a new trial. (Citing *Wilson v. United States*, 149 U. S. 60, 67, 68 (30; 650, 652.)”

See *Williams v. U. S.*, 168 U. S., 380, 398; 42 L. Ed. 509.

1 Hayne, *New Trial and Appeal* (Rev. Ed.), pp. 245, 250.

Another glaring instance of misconduct committed by Mr. Sullivan in his closing argument to the jury, was the following:

“MR. SULLIVAN: Counsel for the defense, *prompted by the defendant, put these questions to Marsha Warrington.*

MR. COGHLAN: We take an exception to the statement of counsel that at the suggestion of the defendant anything was done.” (Assignment of Error No. 99; Transcript of Record, pp. 82, 369.)

This was undoubtedly error. Under a subsequent subdivision of this Opening Brief (No. V thereof), we present our argument with reference to a similar act of misconduct committed by the prosecuting attorneys during the examination of the defendant himself. (Transcript of Record, pp. 355-357; 368-369.)

It is well settled law that one accused of crime cannot be compelled to disclose communications between himself and his counsel.

State v. White, 19 Kansas, 445, 27 Am. R. 137;

Duttenhofer v. State, 34 Ohio St. 91,
32 Am. R. 362.

For the prosecuting attorney to argue, and the trial Judge to permit him to do so, that the defendant had prompted his counsel to put "these questions to Marsha Warrington," was highly improper and deeply prejudicial to the defendant, and invaded a realm which the law holds sacred against any intrusion whatever, viz.: that the relation between an attorney and his client is strictly confidential and their communications privileged.

We do not think it requires either argument or authority to convince this Appellate Tribunal of the erroneous character of such utterances and remarks on the part of a prosecuting officer, entitling a defendant to a new trial.

In concluding our argument on this branch of the case, it may not be amiss to refer to a few expressions of authors on criminal law and of the courts, in speaking generally of the conduct of prosecuting attorneys and of trial judges in criminal cases.

"It is scarcely necessary to add that a prosecuting attorney is a sworn officer of the government, required not merely to execute justice, but to preserve intact all the great sanctions of public law and liberty. No matter

how guilty a defendant may in his opinion be, he is bound to see that no conviction shall take place except in strict conformity to law. It is the duty, indeed, of all counsel to repudiate all chicanery and all appeal to unworthy prejudice in the discharge of their high office; but eminently is this the case with public officers, elected as representing the people at large, and invested with the power which belongs to official rank, to comparative superiority in experience, and to the very presumption here spoken of that they are independent officers of state."

3 Wharton on Criminal Law, Sec. 3003.

"Where a certain class of evidence is desired to be offered, and the offering counsel knows (either from the very nature of the evidence or from objection made by the opponent at the inception of the offer or upon a previous analogous offer) that its admission will be disputed, and therefore that a judicial ruling will be necessary, a sense of professional honor will tell him that in the ordinary case the details of the offer should not be stated in the jury's hearing; because of the possibility that the statement may be taken by them as true and relevant, even though it be excluded by the judge. In this respect the rule of law enforces the standard of honor, and requires the offering counsel either to present the offer in writing, without reading it aloud, to the Court and

the opposing counsel, or, if argument is expected, to afford an opportunity for the jury's retirement before orally stating the offer."

"The same general principle governs the *putting of questions to witnesses*. The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question. When a counsel puts such a question, believing that it will be excluded for illegality or will be negatived, and also having no reason to believe that there is a foundation of truth for it, he violates professional honor."

3 Wigmore on Evidence, Sec. 1808.

The overzealous conduct of the prosecuting attorneys, in their opening and closing arguments to the jury, was manifestly unfair to the defendant.

People v. Hail, 19 Cal. App. Dec. 298, 309 et seq.

See also cases cited on page 179 of this Opening Brief.

"It is the sworn duty of the District Attorney to see that defendant shall have a fair and impartial trial, and that he shall be convicted only by competent evidence, and to secure this he should himself be fair and impartial."

CYC. Vol. 12, p. 571.

“It is not his duty to convict by illegitimate and unfair means, and while the Court will allow for the zeal which is the natural outcome of a legal contest, if by that zeal he is permitted to use unfair and unjust means to procure a conviction it will be reversed.”

CYC., *supra*, citing:

People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719;

State v. Irwin, (Ida. 1903) 71 Pac. 608;

People v. Carr, 64 Mich. 702, 31 N. W. 590;

People v. Dane, 59 Mich. 550, 26 N. W. 781.

See also,

People v. Derbert, 138 Cal. 467, 71 Pac. 564;

Newby v. People, 28 Colo. 16, 62 Pac. 1035;

Flint v. Commonwealth, 81 Ky. 186, 23 S. W. 346;

Leahy v. State, 31 Nebr. 566, 48 N. W. 390;

Randall v. State, 132 Ind. 539, 32 N. E. 305.

An excellent statement of the rule, relating to the conduct of prosecuting officers, is to be found in the opinion of the Supreme Court of the State of California in the case of *People v. Lee Chuck*, 78 Cal. 217, 329, the opinion being delivered by Justice Works, as follows:

“We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.

We regret to say that the assistant district attorney seems to have failed, in this instance, to apply this salutary check to his conduct. The evidence he was seeking to have admitted was clearly incompetent. What was said was not only an argument in favor of its admission, but as to its effect. *The evident intent was to prejudice the jury against the defendant by commenting upon the conduct of others, over whose action he was not shown to have any control, and that in language the impropriety of which is apparent at a glance. The court was appealed to time and again to prevent it, but declined to do so. While we might hesitate to reverse the case on this ground alone, we hold it to have been error. See, as bearing*

on this point, *People v. Mitchell*, 62 Cal. 411, and cases cited; *State v. Smith*, 75 N. C. 306.

Questions of this kind usually arise out of the closing arguments of counsel, but the rule must be the same at whatever stage of the cause the improper language is used."

The over-nourished zeal of counsel displayed in attempts to secure conviction for crime, frequently calls for condemnation on the part of the appellate court, especially when in the closing argument to the jury the attorney for the prosecution travels outside the evidence for his facts or indulges in truculent abuse of the accused.

Smith v. People, 8 Colo. 457;

State v. Hannett, 54 Vt. 83;

Garlitz v. State, 71 Md. 293;

Martin v. State, 63 Miss. 505, 56 Am. Rep. 813;

Perkins v. Guy, 55 Miss. 153, 30 Am. Rep. 510;

Cavanah v. State, 56 Miss. 299.

Where the remarks of the district attorney prejudiced the minds of the jury, for that reason *alone* the judgment *should be reversed*.

Brown v. Swineford, 44 Wis. 282.

It is sufficient that extra professional statements of counsel may gravely prejudice the jury and affect the verdict.

Tucker v. Henniker, 41 N. H. 317;
 State v. Smith, 75 N. C. 306;
 Ferguson v. State, 49 Ind. 33;
 Newton v. State, 21 Fla. 53;
 State v. Underwood, 77 N. C. 502;
 Combs v. State, 75 Ind. 221;
 People v. Barker, 42 N. Y. S. R. 940;
 People v. Ah Len, 92 Cal. 282;
 Fuller v. State, 30 Tex. App. 559.

Not only were the remarks and arguments of the prosecuting attorneys highly improper and deeply prejudicial to the defendant, constituting reversible error, but the attitude and rulings of the trial Judge, in passing upon the improper remarks and arguments of the prosecuting attorneys, constitute error. To repeat the language employed by the Supreme Court in the case of Hall v. U. S., *supra*: "The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitled him to a new trial. (Citing Wilson v. United States, 149 U. S. 60, 67, 68.)"

In the case of People v. Crosby, 17 Cal. App. 518, 526, the following language, apposite to the case at bar, was used: "It appears, there-

fore, that the misconduct of the district attorney was *accompanied by error of the trial court, resulting in the sustaining of the district attorney in the act constituting the misconduct.* When the attention of the court was directed to the act of the district attorney and the same assigned as misconduct, *it was the duty of the court to reprimand the district attorney, and admonish the jury to disregard the statement of the district attorney and the matters suggested by the question; thus, if possible, destroying the baneful effect thereof.* (Citing *People v. Bradbury*, 151 Cal. 678, (91 Pac. 497); *People v. Derwae*, 155 Cal. 592, (102 Pac. 466).)”

The language of the Court of Appeals of New York, in the case of *People v. Becker*, 104 N. E. 396, 463, is peculiarly applicable to the attitude and rulings of the trial Judge in the case at bar.

“While the courts are, as they should be, ready to make due allowance for some inadvertent slip made by zealous counsel in the heat and struggle of a bitterly contested trial, *that consideration, of course, does not apply to the presiding judge, and no case will be found where there has been overlooked the failure or refusal of the trial court in a desperate case like this to correct and check such important and repeated errors as these were:* (Citing *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Conrow*, 200 N. Y. 356, 369, 93 N. E. 943.)”

Relying upon the authorities above cited, we respectfully submit to this honorable court, that, under these assignments of error alone, defendant was not accorded that fair and impartial trial to which he was entitled, and that the verdict found should be set aside.

VI.

MISCONDUCT OF COUNSEL FOR THE PROSECUTION DURING THE TRIAL, PERMITTED AND CONDONED BY THE TRIAL JUDGE, PREJUDICED DEFENDANT AND HIS CASE TO SUCH AN EXTENT WITH THE JURY AS TO DEPRIVE HIM OF A FAIR AND IMPARTIAL TRIAL.

(Assignments of Error Nos. 85, 87, 98, 99, 90; Transcript of Record, pp. 76, 77, 81-82, 358, 359, 368-369, 360.)

“We have had occasion altogether too often to condemn the failure of justice brought about by the reckless conduct of officers whose sworn duty it is to conduct prosecutions legally, and in conformity with settled principles. In some cases, there is some apparent palliation in the excitement of a contested trial, although that does not obviate the mischief. * * * *Nothing can bring more contempt and suspicion on the administration of justice than the failure of its ministers to respect justice. There seems to have been testimony of a proper sort before the jury; and therefore the prisoner cannot be discharged by our order; but he is entitled to a new trial, the expense and delay of which are due to errors that should have been avoided. The verdict must be set aside, and a new trial granted. The other justices concurred.*”

Campbell, Jr., in *People v. Moyer*,
(Mich.) 43 N. W. 928, 929.

1. Under this subdivision, we desire first to assign as misconduct an assignment not noted as such during the trial.

Under another heading in this brief, we have elaborated upon the undue emphasis placed by the prosecution upon the probative value of the blood-stained sheet taken from the Reno cottage. As we therein intimated, the prosecution may have labored under the impression that they could prove a debauched virgin. But, as one of their own witnesses explained the true cause of the blood stains, such error becomes inexcusable. On the other hand, if the purpose was merely to prove that one of the prosecuting witnesses was overtaken by nature while sleeping in the Reno cottage, the undue importance placed by the prosecution upon that fact before the jury constituted gross misconduct. We therefore assign it as such at this time.

This Appellate Court will notice a plain error in the record, even though there be no assignment of error.

United States v. Pena et al., 175 U. S. 500, 44 L. Ed. 251;

Stevenson v. Barbour, 140 U. S. 48, 35 L. Ed. 338;

Rowe v. Phelps, 152 U. S. 87, 38 L. Ed. 365.

No presumption can be made in favor of the judgment of a lower court where error is apparent in the record.

United States v. Wilkinson, 12 How.
246, 13 L. Ed. 974;

Reynolds v. United States, 98 U. S. 145,
25 L. Ed. 244.

In the case of Pettine v. Ter. of New Mex., 201 Fed. 492, 497, the Circuit Court of Appeals said:

“In criminal cases, where the life, or as in this case the liberty, of the defendant for the probable remainder of his natural life is at stake the Courts of the United States in the exercise of a sound discretion may notice grave errors in the trial of a defendant although the questions they present were not properly raised in the trial court by request, objection, or exception.”

Citing:

Wiborg v. United States, 163 U. S. 632,
658, 16 Sup. Ct. 1127, 1197, 41 L. Ed.
289;

Clyatt v. United States, 197 U. S. 207,
221, 25 Sup. Ct. 429, 49 L. Ed. 726;

Crawford v. United States, 212 U. S.
183, 194, 29 Sup. Ct. 260, 53 L. Ed.
465; 15 Ann. Cas. 392;

Weems v. United States, 217 U. S. 349,
362, 30 Sup. Ct. 544, 54 L. Ed. 793;
19 Ann. Cas. 705;

Williams v. United States, 158 Fed. 30,
36, 88 C. C. A. 296, 302;

Humes v. United States, 182 Fed. 485, 486, 105 C. C. A. 158, 159.

2. We next assign, as misconduct on the part of the prosecution, another incident which occurred during the trial, although the same was not assigned as such at the time.

During the cross-examination of defendant, the following proceedings were had (Transcript of Record, 358-359):

“Q. In your testimony (referring to testimony on cross-examination) you have referred repeatedly to conversations and events that took place before the Reno trip. Now what did you understand to mean by the Reno trip?

MR. DEVLIN: Your Honor, I object to that as trying under the guise of cross-examination to ask questions that are not proper to be asked on cross-examination.

MR. DEVLIN: I object to it as not cross-examination of anything brought out on the direct examination of the witness.

THE COURT: The objection is overruled.

MR. DEVLIN: We note an exception.

THE COURT: You do not mean to ask him what he understood to mean, but what trip he referred to?

A. It is perfectly evident what trip it was.

MR. SULLIVAN: Q. Well, do you mean the trip that you and Caminetti and Miss Norris and Miss Warrington took from Sacramento to Reno?

MR. DEVLIN: That is objected to as not cross-examination.

THE COURT: The objection is overruled. They have a right to identify this trip.

MR. DEVLIN: We reserve an exception.

A. Yes sir, the trip I took to Reno, yes, your Honor. I took but one trip to Reno in the month of March, 1913.

Q. And on that trip were you accompanied by Mr. Caminetti, Miss Norris and Miss Warrington?

MR. DEVLIN: I object to that upon the ground it is not cross-examination.

THE COURT: The objection is overruled. He is not asking him anything that occurred on that trip, he is simply identifying the trip.

MR. DEVLIN: We reserve an exception.

A. They were along, yes."

Under another assignment (Subd. VII of this Opening Brief), we show that this was not proper cross-examination. We consider it a clear example of sharp practice on the part of the special prosecutor. The fact that the trial court not only condoned but encouraged it, we respectfully submit, only intensified the gravity of the misconduct.

3. Another incident, which occurred during the re-direct examination of Miss Warrington, and which comes within the category of our last assignment of misconduct, is found on pages 255 to 257 of the record herein:

“MR. ROCHE: Q. Miss Warrington, when Mr. Diggs was putting these questions to you upon the train coming from Truckee to Sacramento, and referred to by counsel representing Mr. Diggs in this case, was that before you ever heard of the White Slave Traffic Act and was it before you ever heard that the United States authorities intended to interfere?

MR. COGHLAN: We object to the question as not proper re-direct examination, and as obviously the fact, and not eliciting a thing that will enlighten us in this case.

THE COURT: It is obviously very leading, Mr. Roche.

MR. ROCHE: Yes, it may be leading, may it please the Court, but it certainly is material.

MR. COGHLAN: Her knowledge of the White Slave Traffic Act?

MR. ROCHE: No. But this is the purpose: so far as the evidence in this case is concerned up to the present time there has been no testimony introduced tending to show that any complaint of any kind emanated from the federal authorities concerning a violation of the White Slave Traffic Act. Now, if these questions were put by Mr. Diggs, and we have counsel's assurance that they were put by him to this witness, those questions were put for some purpose, and that purpose obviously was to prevent a prosecution by the Government of him for a violation of the White Slave Traffic Act.

MR. COGHLAN: *We assign that as misconduct on the part of the District Attorney, and we certainly object to the asking of that ques-*

tion upon the ground that this young lady does not know anything about the White Slave Traffic Act, and it is not re-direct examination.

THE COURT: *I think it is.*

MR. COGHLAN: And furthermore, if your Honor please, the questions propounded were not in the language of Diggs but in substance and effect, and that is as near as I could get by reason of the withholding of that statement by the Government from us.

THE COURT: Don't talk now, Mr. Coghlan, until I get through. You ignore the character of your examination; you put to the witness certain questions purporting to have been put by Diggs to her on the train, very clearly implying a knowledge on the part of Diggs, if he put such questions as you have given to her—of the White Slave Traffic Act. That is what induced my inquiry at the time because you put them to her almost precisely in the language of the White Slave Traffic Act.

MR. COGHLAN: Those were my words.

THE COURTS They have a right on re-direct examination to ask her if she had ever heard of the White Slave Traffic Act or any threatened prosecution under that act. If Mr. Diggs was asking her these questions in order to get answers from her at the time which would protect him against a prosecution, they certainly have a right to ask her whether she was cognizant of that fact.

MR. COGHLAN: Our contention is simply this, that this is not re-direct examination, that those words used by me were my words. I stated again and again that they purported—

THE COURT: Oh no. You were purporting to read from a written statement that you had there.

MR. COGHLAN: I was purporting to read from my own notes, may it please the Court, which were not allowable in evidence or I would have shown them to her.

THE COURT: The objection is overruled.

MR. COGHLAN: We note an exception.

MR. ROCHE: Q. At the time, Miss Warrington, that this examination was being pursued by Mr. Diggs upon the train, had you personally heard or had anyone upon that train suggested that the federal authorities intended to prosecute either Mr. Diggs or Mr. Caminetti for a violation of the White Slave Traffic Act? A. No.

MR. COGHLAN: We object to that upon the same grounds. She says no."

4. Still another pure specimen of sharp practice, indulged in by both attorneys representing the United States and which was aggravated by the indulgence of the trial Judge, will be found on pages 355-357 of the record. The record there shows that the following proceedings took place:

"MR. SULLIVAN: Q. Mr. Diggs, during the course of this trial and in the presence of the jury here, during the cross-examination of Miss Warrington, did you not repeatedly suggest to your counsel questions to be propounded to Miss Warrington asking her if she did not at divers times have intercourse with you?

MR. DEVLIN: I object to that question as immaterial, irrelevant and incompetent. *I assign the asking of the question as error and misconduct on the part of the District Attorney because there is nothing shown here that anything was said in the presence of the jury, and the putting of the question is simply intended as calculated to prejudice the defendant in the eyes of the jury.*

THE COURT: The question is objectionable as relating to a certain matter that is entirely within the rights of the defendant, if he made suggestions to his counsel it was entirely within his rights to do so. *Do you mean made such suggestions audibly?*

MR. SULLIVAN: *No. I do not mean audibly—that is, not within the hearing of the jury, but within the presence of the jury.*

THE COURT: I do not think that is material.

MR. SULLIVAN: *And loud enough for those in the vicinity of counsel to hear.*

THE COURT: *That of course is a different thing; I don't think that is cross-examination or a transgression of a defendant's rights.*

MR. ROCHE: Except in this way, your Honor, if you will pardon the interruption, that the witness upon the stand at this time expresses or apparently expresses a reluctance to testify to an act of intercourse between himself and Miss Warrington. If it be true that on the cross-examination of this young girl in the presence of the jury, and in an audible tone of voice he did put to his counsel questions and to have put these questions to her for the purpose of eliciting from her lips the fact that he did have on numerous occasions intercourse,

that fact should go to the jury for the purpose of enabling them to determine whether in declining a moment ago to answer whether he had intercourse on his wife's bed with this young girl he was acting in good faith.

THE COURT: I have ruled that that is not a proper question.

MR. DEVLIN: *And I assign the conduct of the attorney who just addressed the Court as being prejudicial to the rights of the defendant, it is misconduct, and it was made after your Honor ruled upon the question.*

THE COURT: Oh, there is nothing in that; they have a perfect right to be heard. I don't think there is any necessity for going into a question of that kind.

MR. DEVLIN: Inasmuch as they have commented on the conduct of the defendant and attacked his motives I ask the privilege at this time of allowing him to explain his reasons.

THE COURT: You can have him explain that later on. You cannot control their cross-examination.

MR. DEVLIN: But I desire to answer Mr. Roche. He has made a speech to the jury for the purpose of producing a certain effect. I ask for the purpose of making a statement to counteract that.

THE COURT: Mr. Devlin, you know that that is not the proper method of trying the case. The jury all understand that the arguments of counsel arising on an objection is not evidence in the case and is not to be considered by the jury in determining the issue to be submitted to them.

MR. DEVLIN: We ask your Honor now to instruct the jury to disregard that.

THE COURT: I will instruct the jury at the proper time for instructing them.

MR. DEVLIN: We take an exception to the conduct of the Assistant Attorney."

This same subject was, over our objection, commented upon by counsel for the Government during their closing address to the jury, when the following incidents were recorded (Transcript of Record, pp. 368-369):

"MR. SULLIVAN: Gentlemen, if there is any depraved man in the world, if there is any man who has sunk to the uttermost depths of depravity, it is that man in form, because he is a man in form alone, who seduces an innocent girl and then exposes her shame to the world. If he had one redeeming trait of character in his composition, having blasted the life of that virgin, he ought to be willing to take fifty years in the penitentiary before he would come before a jury of his fellow citizens and before the world, and say yes, I seduced that girl, before he would come before a jury of his fellow citizens and recount time after time when he had illicit intercourse with this girl. A decent man would die first.

MR. DEVLIN: If your Honor please, I except to that because no such language came from the defendant; it all came from Marsha Warrington.

MR. ROCHE: It came from Marsha Warrington upon your cross-examination for the first time.

MR. DEVLIN: We had a right to cross-examine her.

THE COURT: Mr. Sullivan, confine yourself to the evidence; don't transgress it.

MR. SULLIVAN: Counsel for the defense, *prompted by the defendant, put these questions to Marsha Warrington.*

MR. COGHLAN: We take an exception to the statement of counsel that at the suggestion of the defendant anything was done."

(See 3 Wigmore on Evidence, Sec. 1808, quoted post.)

5. On page 360 of the Record, the following assignment of misconduct on the part of counsel for the Government will be found recorded:

"Q. Did you narrate to your counsel what took place in your wife's bedroom, the fact that you had testified to here on this stand, before you were brought here as a witness in Court.

MR. DEVLIN: *I object to that. I object to any conversation passing between the counsel and the witness on the stand.*

MR. SULLIVAN: I will withdraw the question.

MR. DEVLIN: *And I assign the conduct of the District Attorney in asking such question as misconduct."*

We respectfully submit that a mere reading of the record will disclose the prejudicial effect

of these various assignments of misconduct on the part of the prosecution.

The mere fact that Mr. Sullivan withdrew his question, just previously quoted, only intensifies and aggravates the misconduct. It indicates that he knew that he had no right to ask such a question. As already stated, in a preceding subdivision of this Opening Brief (No. IV thereof):

“A prisoner, when upon the stand, cannot be compelled to disclose communications between himself and his counsel.”

State v. White, 19 Kansas, 445, 27 Am. R. 137;

Duttenhofer v. State, 34 Ohio St. 91, 32 Am. R. 362.

The rules governing the conduct of prosecuting attorneys is nowhere better stated than follows:

“The same general principle governs the *putting of questions to witnesses*. The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question. When a counsel puts such a question, believing that it will be excluded for illegality or will be negated, and also having no reason to believe that there is a

foundation of truth for it, he violates professional honor."

We do not think it necessary further to elaborate on these various assignments of misconduct on the part of the prosecuting attorneys.

VII.

THE TRIAL COURT ERRED IN COMPELLING THE DEFENDANT TO TESTIFY TO CERTAIN MATTERS WHICH WERE NOT THE PROPER SUBJECT OF CROSS-EXAMINATION.

(Assignments of Errors Nos. 85, 86, 87; Transcript of Record, pp. 76, 77, 358, 359.)

“Q. In your testimony you (the defendant) have referred repeatedly to conversations and events that took place before the Reno trip.

MR. DEVLIN: Your Honor, I object to that as trying under the guise of cross-examination to ask questions that are not proper to be asked on cross-examination.

MR. DEVLIN: I object to it as not cross-examination of anything brought out on the direct examination of the witness.

THE COURT: The objection is overruled.

MR. DEVLIN: We note an exception.

THE COURT: You do not mean to ask him what he understood to mean, but what trip he referred to?

A. It is perfectly evident what trip it was.

MR. SULLIVAN: Q. Well, do you mean the trip that you and Caminetti and Miss Norris and Miss Warrington took from Sacramento to Reno?

MR. DEVLIN: That is objected to as not cross-examination.

THE COURT: The objection is overruled. They have a right to identify this trip.

MR. DEVLIN: We reserve an exception.” (Transcript of Record, p. 358.)

A. Yes sir, the trip I took to Reno, yes, your Honor. I took but one trip to Reno in the month of March, 1913.

Q. And on that trip were you accompanied by Mr. Caminetti, Miss Norris and Miss Warrington?

MR. DEVLIN: I object to that upon the ground it is not cross-examination.

THE COURT: The objection is overruled. He is not asking him anything that occurred on that trip, he is simply identifying the trip.

MR. DEVLIN: We reserve an exception.

A. They were along, yes. (Assignment of Error No. 87; Transcript of Record, pp. 77, 358.)”

The defendant, in his direct examination, had not testified to any matter in relation to the alleged trip to Reno, Nevada. His whole testimony was, under direct examination, confined to matters previous thereto and was for the purpose of showing that he had not “persuaded, enticed, or coerced” the women to take the alleged trip, and furthermore that the intent and purpose of the departure from Sacramento for Reno was not that alleged against him in the indictment and denounced by the

“White-slave traffic Act.” Counsel for the prosecution, over our objection, were thus allowed by the Court to go farther and compel the defendant practically to incriminate himself on cross-examination.

That interstate transportation is the deciding element of guilt in white slave traffic is held by Mr. Justice Pitney in *Wilson v. U. S.*, 232 U. S. 570. Were the case at bar, therefore, a white slave traffic crime, the question put and ruling by the trial court thereon would be upon a material element of the crime not touched upon in defendant’s direct examination.

It is elementary that the moment a cross-examiner departs from the subject covered in the direct examination he immediately makes the witness his witness. In the federal courts this rule inheres in civil and criminal actions alike.

In civil actions:

The late Mr. Justice Lurton, as Circuit Judge, in *Montgomery v. Aetna L. Ins. Co.*, 97 Fed. 913, 916; 38 C. C. A. 553, said:

“Upon objection by the plaintiff, the court ruled that the cross-examination should be confined to matters covered by the examination in chief, and sustained an objection to a number of questions which related only to the subject matter of the set-off. This was not error.

The right to cross-examine in courts of the United States is limited to facts and circumstances connected with the matter testified to upon the original examination of the witness. If it is desired to examine the witness as to other matters, the proper practice is to call the witness as the witness of the party desiring to make such proof. *Houghton v. Jones*, 1 Wall. 702, 706; *Wills v. Russell*, 100 U. S. 621-625."

To the same effect see:

Northern Pac. Ry. Co. v. Urlan, 158 U. S. 271, 39 L. Ed. 977; 15 Sup. Ct. 840;

Ry. Co. v. Stinson, 14 Peters. 448, 461; *Moxie Nerve-Food Co. v. Beach*, 35 Fed. 465;

Goddard v. Crefield, 75 Fed. 818, 21 C. C. A. 530.

In criminal actions:

"Of course, cross-examination is, in the federal courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony."

Brewer, Jr., in U. S. v. Mullaney, 32 Fed. 370-1.

For a thoroughly considered case upon this subject and a collection of abundant authority, we refer to the case of *Harrold v. Ter. of Oklahoma*, 169 Fed. 47, 94 C. C. A. 415, 17 A. & E. Ann. Cas. 868.

Tingle v. U. S. 87 Fed. 320, 30 C. C. A. 666;

Ballew v. U. S., 160 U. S. 187, 191-192;
40 L. Ed. 388; 16 Sup. Ct. 263.

It is, therefore, apparent that when counsel for the United States asked the defendant questions regarding his trip to Reno and who accompanied him upon that trip that our objection should have been sustained. The defendant became the witness of the prosecution and was compelled by the court's ruling to be an unwilling witness against himself contrary to the letter and spirit of the constitutional provision.

VIII.

DEFENDANT WAS ENTITLED TO AN EXAMINATION OF THE TALESMEN WHICH WOULD HAVE PERMITTED AN INTELLIGENT USE OF HIS PEREMPTORY CHALLENGES. THE DENIAL OF SUCH RIGHT BY THE TRIAL COURT IN THIS CASE CONSTITUTES REVERSIBLE ERROR, DEFENDANT HAVING THEREBY BEEN DEPRIVED OF A FAIR AND IMPARTIAL TRIAL.

(Assignments of Error Nos. 26, 27, 28, 29, 31; Transcript of Record, pp. 58, 143, 144, 145, 151-152.)

Under separate assignments of error in this brief, we show misconceptions of the case indulged by the trial court. One was that the White Slave Traffic Act is constitutional when applied to other than white-slave cases. Another, that the Act applies to cases other than white-slave cases—where purely immoral actions are involved—and in which the defendant is not shown to be a white-slaver, or engaged in the white-slave traffic. Still another, where the trial court conceived the issue to be an interstate seduction case while the plead-

ings and evidence plainly drew an issue on the question of “to-wit, that the said Marsha Warrington should be and become the *concubine* and the *mistress* of the said defendant.”

When we consider these erroneous conceptions which were entertained by the trial Judge throughout the trial, we can clearly perceive the error upon his part in limiting the examination of jurors on behalf of defendant.

Louis Block was the second talesman called. During his examination on his *voir dire* the following proceedings were had:

“Q. If it should appear to you that according to the letter of the White Slave Act, the defendants in this case are not guilty, you would find them not guilty, would you not?”

THE COURT: Wait a moment. Don’t indulge in that sort of questions.

MR. COGHLAN: Very well.

Q. You said you have discussed the White Slave Act——

THE COURT: He has already answered that he believes in the White Slave Act.

MR. COGHLAN: Q. And if the prosecution does not prove, under the terms of the White Slave Act, that the defendant in this case is guilty, would you——

THE COURT: Don’t ask a question of that kind again, Mr. Coghlan.

MR. COGHLAN: Very well, your Honor. We reserve an exception to the ruling of the

Court.” (Assignment of Error No. 26; Transcript of Record, pp. 58, 143.)

“MR. COGHLAN: Q. The Special Prosecutor in the case has stated to you what the prosecution here is, and has mentioned the fact that the purpose behind the transportation was the bringing of these young women from Sacramento to Reno; the Court will instruct you, I assume, as to the elements of the case. Now, if you find, from the instructions of the Court, that there are certain essential elements to this crime necessary to be proved on the part of the prosecution, you will follow that instruction to the letter, will you not?

MR. SULLIVAN: We object to that question.

THE COURT: The objection is sustained and don't ask any more questions of that kind. You can ask the juror if he will obey the instructions of the Court and abide by the evidence. In other words, if there are any elements in his mind that would preclude him from answering the question to that effect you may ascertain that.

MR. COGHLAN: We reserve an exception, your Honor, and we will obey the admonition of the Court.” (Assignment of Error No. 27; Transcript of Record, pp. 58, 144.)

“Q. Are you willing, if chosen as a juror in this case, to enter into the trial of the case assuming that the defendant is innocent of the crime charged in these several counts?

MR. SULLIVAN: We object to that question.

THE COURT: The objection is sustained.

MR. COGHLAN: We reserve an exception.” (Assignment of Error No. 28, Transcript of Record, pp. 59, 149.)

“Q. Would the fact that this case has been, if it appears to have been given publicity, effect your judgment with respect to the guilt or innocence of the defendant? A. I don’t think so. Q. And it would not make any difference to you whether some persons wanted the defendant found guilty or wanted him found innocent, you would stand upon the evidence and upon the instructions given to you by the Court and return your verdict accordingly?”

MR. SULLIVAN: We submit that he has already answered that substantially.

THE COURT: Yes, he has. I do not see the necessity of repeating things of that kind. It does not add anything to it. The jurors are intelligent men and they ordinarily mean what is imported by their answer. He has already told you that he would obey the instructions of the Court and would be governed by the evidence in the case. Refrain from repetition.

MR. COGHLAN: Very well, your Honor. I will reserve an exception if your Honor will allow it.” (Assignment of Error No. 29; Transcript of Record, pp. 59, 145.)

Counsel for defendant were therefore thus limited by the trial Judge in their examination of the entire jury, as the first talesman passed for cause was peremptorily excused.

We respectfully submit that the trial court in thus limiting the defendant’s examination of the jurors committed reversible error. The object of the examination shown above was for the purpose of enlightening counsel for the

defendant upon the views and opinions of the talesmen regarding immoral conduct generally. Counsel well knew that the evidence would disclose gross immoral conduct of the defendant, but that such conduct would not amount to an infraction of the statute under which the defendant had been indicted. Defendant in such case was entitled to be tried by a jury composed of men broad-minded enough to perceive the distinction.

The curtailing of the examination by the trial court thus confined defendant's examination of the talesmen to their qualifications to sit as jurors and actual and implied bias.

As a matter of law, defendant was entitled to an examination of the talesmen which would have allowed his counsel to exercise an intelligent use of his peremptory challenges.

"When the qualifications of a juror have thus been tried, no bill of exceptions can portray the manner, tone, and bearing of the juror as he appeared and acted before the trial court during the examination; and for this reason, when the juror has said he can lay aside his previously formed opinion, and the court believes he can do so, its discretion, when exercised, will not be reviewed upon appeal except for a manifest abuse thereof. But it is not to be expected that the manner, tone, or appearance of the juror, without an oral examination as to the state of his mind upon the merits of the issue involved, are alone sufficient to deter-

mine his qualifications. The statute has wisely granted to the defendant in a criminal action the right to a certain number of peremptory challenges, which he may exercise without assigning any reason therefor; and to enable him to do so intelligently he is entitled of right to inquire into the fitness of persons called as jurors to try him, and in many instances he can determine when to wisely exercise this right only from their examination. In *Hale v. State* (Miss.) 16 South. 387, the accused was jointly indicted with one J. G. Robertson for the crime of murder. A separate trial having been granted, the state adopted the theory that the homicide was committed in pursuance of a conspiracy entered into between the defendant and Robertson. The accused, when the jury was being impaneled, propounded questions to the persons called concerning any opinion they might have formed as to the guilt or innocence of Robertson, but the court refused to permit them to answer. The defendant, having been convicted, appealed, and the Supreme Court of Mississippi, in reversing the judgment, and commenting on the defendant's right to propound the questions, say: 'It was his right to make such examination as would enable him to decide if there was ground for exercising his great right to peremptorily challenge. This right, conferred upon him by law, could only be intelligently exercised after a full and fair inquiry of each juror as to the exact state of his mind and feelings, not only as affecting the defendant personally and primarily, but as likely to affect his action as a juror even, and perhaps unconsciously to himself. The office of the peremptory challenge is to protect the defendant against those

legally competent, but morally or otherwise unfit or unsuitable to try the particular case; and to deny a full and fair examination of a juror in order to wisely exercise the peremptory challenge would be practically to nullify the right, for of what avail would a peremptory challenge be if exercised at random or blindly, and without reason? The right to peremptory challenge is the last precious safeguard of a fair trial left to one capitally charged, before he puts life and liberty in the keeping of his sworn triers."

State v. Steevers, (Ore.) 43 Pac. 947, 950.

To the same effect, see:

24 Cyc. "Juries," XIII, G. 7, (111) p. 338 and cases.

Another error committed by the trial Judge, to the prejudice of the defendant, was in denying defendant the right to ask the talesman Philip S. Woolsey whether he had served as a petit juror in any district court more than one term in a year.

This error arose during the following proceedings upon the examination of the talesman Woolsey on his *voir dire*:

"THE COURT: Is the defendant satisfied with the jury?"

MR. COGHLAN: We would like to ask Mr. Woolsey the same question we propounded to the other juror.

THE COURT: I cannot permit you to go back any further. Proceed and exercise your challenge.

MR. COGHLAN: Very well, we reserve an exception. We will challenge Mr. Woolsey."

"That the questions propounded to the other juror, which counsel for the defendant desired to ask of the talesman Philip S. Woolsey, which appear in the examination of the talesman John J. Porcher, are as follows:

"MR. COGHLAN: May I ask Mr. Porcher one question, if the Court please?

THE COURT: Oh, very well, you may ask it.

MR. COGHLAN: Q. Mr. Porcher, have you served as a juror in this or any other United States Court within the last year?

A. I have not.

Q. Or any other court in the State of California?

A. I served 2½ years ago or 3 years ago in Judge Lawlor's court, but since then not."

Thereupon the jury box being filled, the counsel for the defendant exercised their third peremptory challenge and peremptorily excused Mr. Phillip S. Woolsey."

(Assignment of Error No. 31; Transcript of Record, pp. 60, 151-152.)

Sec. 286 of the Judicial Code, being the Judiciary Act of the Congress of the United States, approved March 3, 1911, provides:

"No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of chal-

lenge to any juror called to be sworn in any case that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.”

In view of the above clear and peremptory provision of law, it is difficult to imagine why the trial Judge should have deliberately ignored its terms. Upon what theory he permitted the question to be asked of the talesman Porcher, and would not consent to the question being asked of the talesman Woolsey, is incomprehensible to us. At any rate, counsel for defendant were compelled to exercise a peremptory challenge as to the talesman Woolsey.

In his charge to the jury, the trial Judge stated: “It is your duty, *equally with mine, to administer the law as you find it, regardless of our individual views or sentiments, as to its policy.* In my judgment, the law (the “White-slave traffic Act”) is a good one as in the interests of public morals and decency, *but even if I thought otherwise it could make no difference to my obligation to do my part toward aiding in its enforcement while it remains upon the statute books.*” (Transcript of Record, p. 370.)

We respectfully submit that the trial Judge should have pursued the doctrine he so felicitously expounded to the jury, and should have heeded the mandatory provisions of Sec. 286 of the Judicial Code. We submit that it was his duty, under that section, to permit the attorneys for the defendant to inquire of the talesman Woolsey whether he had served as a juror "in this or any other United States court within the last year," in the same manner in which he allowed the question to be asked of the talesman Porcher.

Finally, with reference to our assignments of error as to the rulings of the trial Judge in passing upon the qualifications of talesmen, we refer to page 156 of the Transcript of Record, disclosing that: "All of the peremptory challenges on the part of the United States and on the part of the defendant had been exhausted."

IX.

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE FOLLOWING INSTRUCTION REQUESTED ON BEHALF OF DEFENDANT:

“In considering the testimony of the witness, Marsha Warrington, and determining the credibility to be attached thereto, and the weight to be given her evidence, you may consider her motive in testifying, whether or not she has been, or appears to be, acting under the influence of any person or persons, whether or not any promise of immunity has been offered to her, and any hope she may have for leniency in any criminal action brought against herself.” (Assignment of Error 109; Transcript of Record, pp. 87-88, 395, 401.)

Cochrane v. State, 113 Ga. 726.

Not only did the trial Judge refuse to instruct the jury that Marsha Warrington was an accomplice, but he refused to give the cautionary instruction above requested. He did this, in face of the fact that it affirmatively appeared in evidence that the witness Marsha Warrington was then being held under a warrant and was out on bail for her complicity in leaving Sacramento with the defendant Diggs and going with him to Reno, Nevada. (See Transcript of Record, p. 255.)

The propriety of having instructed the jury, as requested on behalf of the defendant, cannot be doubted. The credibility of Marsha Warrington, the weight to be given her evidence, her motives in testifying, whether or not she had been, or appeared to be, acting under the influence of anyone in giving her testimony, whether or not any promise of immunity had been offered to her, or any hope held out to her that she might have leniency in any criminal proceeding against her; all these matters were for the jury to pass upon in determining what weight and credibility to attach to her testimony.

X.

THE TRIAL COURT ERRED IN FAILING TO GIVE THE FOLLOWING INSTRUCTIONS, REQUESTED ON BEHALF OF DEFENDANT:

“You are further instructed that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and the accused must be found not guilty unless the fact of his guilt is proven beyond every reasonable doubt to the actual exclusion of every reasonable hypothesis of their innocence consistent with the facts proven.” (Assignment of Error No. 101; Transcript of Record, pp. 84, 395, 397.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

People v. Roberts, 1 Cal. App. 447.

“The Court instructs you that in civil cases, if there be conflicting evidence, the duty of the jury is to weigh it, and render a verdict according to its preponderance; but in criminal cases, the guilt of the accused must be fully proven, and it is not sufficient that the weight of the evidence points to his guilt.” (Assignment of Error No. 148; Transcript of Record, pp. 105, 395, 419.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

Bones v. State, 117 Ala. 138; 23 So. 138.

These instructions should have been given. Furthermore, the difference between the

amount of proof required in a criminal case and a civil suit should have been explained to the jury. Especially so, where, as in the federal Courts, jurors are required to try both criminal and civil cases during the term of their jury service.

XI.

THE TRIAL COURT ERRED IN FAILING TO GIVE THE FOLLOWING INSTRUCTIONS REQUESTED ON BEHALF OF DEFENDANT AS TO CIRCUMSTANTIAL EVIDENCE:

“You are hereby further instructed that insofar as the prosecution relies upon circumstantial evidence to establish the guilt of the defendant, to authorize a conviction on circumstantial evidence, ‘each of the circumstances should not only be consistent with the defendant’s guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt.’ ” (Assignment of Error No. 105; Transcript of Record, pp. 86, 395, 399.)

People v. Nelson, 85 Cal. 421;
State v. Lucas, 97 N. W. 1007.

“I further instruct you that to warrant a conviction on circumstantial evidence, ‘each fact in any chain of facts from which the defendant’s guilt is to be inferred must be proved by the same weight, degree, and the force of the evidence as if it were the main fact of the defendant’s guilt itself. All of such facts must be consistent, each with all of the others, and with the defendant’s guilt, and all, taken together, must be so strong as to exclude, to a moral certainty, every reasonable hypothesis

but that of the defendant's guilt.' '' (Assignment of Error No. 106; Transcript of Record, pp. 86, 395, 399.)

People v. Anthony, 56 Cal. 600;

People v. Ah Ching, 54 Cal. 402;

State v. Gatlin, 170 Mo. 354; 70 S. W. 885.

“The jury are instructed that in order to convict the defendant upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other reasonable conclusion. It is not sufficient that the circumstances proven coincide with, account for, and render probable the hypothesis sought to be established by the prosecution, but they must exclude, to a moral certainty, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty.” (Assignment of Error No. 107; Transcript of Record, pp. 86-87, 395, 400.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

Benton v. State, 78 Ark. 284.

The above instructions were all taken from approved authorities and should have been given.

The prosecution relied, for a verdict of guilty on the first four counts of the indictment, upon circumstantial as well as direct evidence. The prosecuting attorneys adverted to

the circumstantial evidence time and again in their opening and closing arguments to the jury. The jury should have been instructed very fully upon the law of circumstantial evidence. The trial Judge, outside of a short instruction to the effect that each link in a chain of circumstantial evidence must be supported by the same degree of proof (Transcript of Record, p. 381), only gave to the jury the following brief instruction:

“And where circumstantial evidence is relied upon in whole or in part, for a conviction, such circumstances should not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary course of things and the defendant be innocent.” (Transcript of Record, p. 381.)

In view of the wide range which the trial Judge permitted in the introduction of the evidence, treating the prosecution as akin to one for conspiracy, the above instruction was entirely too limited, to be of any effective assistance to the jury. The question of the intent and purpose of the defendant in going with Marsha Warrington from Sacramento to Reno was one of the principal points, if not the principal point, for the jury to pass upon in arriving at the defendant's guilt or innocence. This was largely, if not entirely, a question of circumstantial evidence. The trial Judge did not hesitate to instruct the jury as follows:

“The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observations in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Indeed if such were not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men committing a wrongful act do not ordinarily proclaim in any open, definite manner the real purpose or intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established.” (Transcript of Record, pp. 378, 379.)

In view of the above charge to the jury, the trial Judge should also have given the instructions on circumstantial evidence requested on behalf of the defendant. If the learned trial Judge attributed so much importance to the circumstances in evidence tending to show the intent and purpose of the defendant, he should

certainly have given the instructions on the weight, scope and proper limitation of circumstantial evidence in determining guilt, requested by counsel for the defendant. In refusing to do so, we respectfully submit that he committed serious error.

XII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE AT LEAST SOME OF THE SEVERAL INSTRUCTIONS REQUESTED ON BEHALF OF THE DEFENDANT RELATING TO THE QUESTION OF THE SPECIFIC INTENT DENOUNCED BY THE "WHITE-SLAVE TRAFFIC ACT."

All of these requested instructions may be considered together. We state, frankly, that we did not expect the trial Court to give all of the instructions requested on the subject of the intent and purpose of the defendant, but we do contend, with all deference to the learned trial Judge, that some of these instructions, at least, should have been given.

As previously stated, the question of the intent and purpose of the defendant in leaving Sacramento with Marsha Warrington was one of, if not the most, important and vital points in the case, which were submitted to the jury in determining the defendant's guilt or innocence. The jury should have had the benefit of any instructions which would have assisted it in arriving at an intelligent and just conclusion with respect to the intent and purpose of the defendant.

It was the contention of the government that the intent and purpose of the defendant in leaving Sacramento with Marsha Warrington was

“that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant.” (See Indictment, Transcript of Record, p. 2.)

It was the contention of the defendant that he left Sacramento with Marsha Warrington for no such purpose; that the intent and purpose of his leaving Sacramento, as well as that of Marsha Warrington and Lola Norris, was to avoid the impending notoriety, scandal and disgrace that all expected would fall upon them should they remain in Sacramento, because of their indiscretions; that he feared the wrath of his father; that he was also fearful of the steps his wife might take against Marsha Warrington; that he feared the anger of Marsha Warrington's father and uncle; that he was apprehensive of arrest by the authorities in Sacramento; that for all of these reasons and others appearing in evidence he left Sacramento to avoid trouble, disgrace, personal harm and impending arrest and did *not* leave with the then purpose and intent of co-habiting with Marsha Warrington as his concubine or mistress or

that Lola Norris should co-habit with F. Drew Caminetti as the latter's concubine or mistress, as charged in the indictment.

All these matters were placed in evidence and testified to, not only by Marsha Warrington and Lola Norris, but by I. P. Diggs, the father of Maury I. Diggs; by Lina Diggs, the wife of Maury I. Diggs; by Elizabeth Caminetti, the wife of F. Drew Caminetti; by J. A. Putnam, editor of the sporting columns of the Sacramento "Bee;" by D. T. Leitch, P. J. O'Brien and M. H. Diepenbrock, all residents of Sacramento.

It would prolong to unwarranted limit this already too lengthy brief, even to give an epitome of the testimony of each one of the above witnesses, but a reading of the evidence contained in the Transcript of Record will disclose the facts just as we have stated them.

The intent and purpose of the defendant in leaving Sacramento and going to Reno was to avoid trouble, notoriety, scandal, disgrace, bodily harm, and, as he feared, to escape arrest by the State authorities in Sacramento. The intent and purpose of Marsha Warrington and Lola Norris in leaving Sacramento was substantially the same. This intent and purpose was, obviously, totally inconsistent with the in-

tent and purpose denounced by the "White-slave traffic Act" and charged in the indictment. After arriving at Reno, *after crossing the State line*, whatever was done by the defendant and Marsha Warrington of an immoral nature was a matter of afterthought and subsequent arrangement and had nothing to do with *the original intent and purpose of the defendant in leaving Sacramento*. Under this view of the case and in consideration of the contention of the defendant, made clear repeatedly to the trial Judge from the examination of the witnesses by his attorneys, and their statements to the court and their arguments to the jury, we respectfully submit that at least some of the subjoined instructions should have been given by the trial Judge.

We append all of the requested instructions on this subject, which were refused by the trial Court.

"You are further instructed that in all cases where an act is not criminal, or is criminal in a less degree, unless committed in a certain state or condition of mind, this certain state or condition of mind is what is known in law as a specific intent, and express proof of this specific condition of mind is necessary in order to convict of the crime charged." (Assignment of Error No. 116; Transcript of Record, pp. 91, 395, 404.)

“The Court instructs the jury that in every case where a specific intent is necessary in order to constitute a particular crime, the burden of proving such specific intent is upon the prosecution, and unless they prove that specific intent or state of mind to your satisfaction beyond all reasonable doubt, it is your duty to acquit.” (Assignment of Error No. 117; Transcript of Record, pp. 91, 395, 404.)

“Although it is true that ignorance of law is no excuse for crime, yet when the law is unsettled, or obscure, or when the guilty intention, being a necessary constituent of the particular offense, is dependent upon a knowledge of the law or of its existence, then the general rule, if enforced, would be misapplied, and in such cases ignorance of law is an excuse.” (Assignment of Error No. 118; Transcript of Record, pp. 92, 395, 404-405.)

“Although it is true that every person is presumed to know the law, and that ignorance of the law is no excuse for crime, yet, in a case where there is doubt as to the interpretation of the law, a person acting under a mistaken opinion as to the proper interpretation of such law may be excused upon that ground.” (Assignment of Error No. 119; Transcript of Record, pp. 92, 395, 405.)

“The Court instructs the jury that where a defendant is charged with the violation of a statute which expressly requires, in order to render an act punishable, that it should be done with a specific intent or purpose or state of mind, if from ignorance of law, or from any other reason that specific intent does not exist, there is lacking one of the elements of the

crime, and if you find from the evidence in this case that through ignorance of law the defendant did not have that specific intent and state of mind charged in the indictment, it is your duty to acquit him regardless of how you view his conduct otherwise." (Assignment of Error No. 120; Transcript of Record, pp. 92-93, 405, 395.)

"The Court instructs you that the mere taking away or transporting, or purchasing tickets for transportation or transporting, or inducing or enticing a female to go to a state other than the state of California is not in itself a crime unless these acts are done with the specific intent and purpose alleged in the indictment." (Assignment of Error No. 121; Transcript of Record, pp. 93, 395, 406.)

People v. Black, 147 Cal. 426.

"You are instructed that when one is said to have taken away a female for the purpose of concubinage, that means in law that the party charged with such taking away purposed or meant to create a sort of marriage relation between himself and the female; that he purposed to co-habit with her; and to have continual sexual intercourse with her, and if you find from the evidence that this was not his purpose, or if not convinced beyond all reasonable doubt that such was his purpose, it is your duty to find him not guilty." (Assignment of Error No. 122; Transcript of Record, pp. 93, 395, 406.)

"Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reason-

able doubt that he did them, that there existed in his mind the purpose and intent that the said Marsha Warrington should become the mistress and concubine of the said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Marsha Warrington, of concubinage, which is a natural marriage, as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continued illicit co-habitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of the acts alleged in the indictment, you must find a verdict of acquittal." (Assignment of Error No. 123; Transcript of Record, pp. 94, 395, 406-407.)

"You are instructed that one, two, or even half a dozen acts of illicit intercourse would not of themselves constitute concubinage, but there must exist a purpose and intent to have an habitual and continued illicit co-habitation with the woman in question, and you must believe beyond a reasonable doubt, before you can convict the defendant under this indictment, that his purpose was that the said Marsha Warrington should be and become his concubine and mistress, and that his purpose was not merely to have illicit sexual intercourse with her; for if his purpose was merely to gratify his desires by rape, seduction or fornication, he would not be guilty under this indictment, and you must acquit him." (Assignment of Error No. 124; Transcript of Record, pp. 94-95, 395, 407.)

“You are further instructed that defendant is charged with the crime alleged in the indictment in this case, and no other offense. The burden of proving every material allegation of this indictment is upon the prosecution and if they fail to so prove it to your satisfaction beyond all reasonable doubt, it is your duty to acquit, even though you may be satisfied the defendant is guilty of some crime other than that charged.” (Assignment of Error No. 125; Transcript of Record, pp. 95, 395, 408.)

In determining whether or not at the time of the alleged commission of the offense charged in the indictment, the defendant had the specific state of mind charged, you may consider all the evidence relating to such acts and relations of the parties, and, after a full and careful consideration of all the evidence, you are not satisfied beyond all reasonable doubt that the state of mind alleged in the indictment actually existed, but believe that defendant’s acts were actuated by motives other than that alleged, it is your duty to find him not guilty.” (Assignment of Error No. 126; Transcript of Record, pp. 95, 395, 408.)

“In determining the question as to whether or not the defendant had the specific intent, purpose and state of mind charged in the indictment, you may consider all the relations between the defendant and the said Marsha Warrington, and their disposition toward each other, and for this purpose you may consider any evidence of acts of prior sexual intercourse between them; as tending to show whether or not it was necessary to co-habit with the said Marsha Warrington outside of the State of California, and if you find from the evidence

that it was not his intention or purpose in going into the State of Nevada to co-habit with the said Marsha Warrington, but was induced to go for another purpose, you must find him not guilty even though he did commit an act of sexual intercourse with her in the State of Nevada.” (Assignment of Error No. 127; Transcript of Record, pp. 96, 395, 409.)

“You are instructed that in determining the question as to what was the state of mind of the defendant at the time of the commission of the alleged offense it is proper for you to consider all of his acts at the time and all the facts and circumstances in evidence that bear in any manner upon his state or condition of mind; you may consider all conversations with others as bearing upon the purpose of his going into the State of Nevada, and all the acts and conversations of the defendant with said Marsha Warrington, Lola Norris, or F. Drew Caminetti, or any of them.” (Assignment of Error No. 128; Transcript of Record, pp. 96-97, 395, 409.)

“If you find from the evidence in this case that the main purpose and intent of defendant in taking the said Marsha Warrington from the State of California into the State of Nevada, if you find beyond all reasonable doubt that he did so take her, was fear of publicity or disgrace or fear of arrest, and that he took her from the state to avoid public disgrace or for any other reason than that charged in the indictment, you cannot convict the defendant as charged, but must acquit him.” (Assignment of Error No. 129; Transcript of Record, pp. 97, 395, 410.)

“You are instructed that the indictment in this case charges in the first count, that the defendant transported and caused to be transported to Reno, in the State of Nevada, one Marsha Warrington, ‘for the purpose of debauchery and for an immoral purpose, to-wit, —that the aforesaid Marsha Warrington should be, and become the concubine and mistress of the said defendant.’ In order to convict the defendant upon this count of said indictment it is essential that the prosecution prove beyond all reasonable doubt, not only that the said Marsha Warrington was transported, but that said transportation was done for the purpose alleged in said indictment, and that such intent or purpose existed in the mind of the defendant at the time of such transportation. And, if you find that the prosecution has failed to prove such purpose to your satisfaction beyond all reasonable doubt, it is your duty to find him not guilty upon this count of said indictment even though you may be satisfied that he had immoral relations with the said Marsha Warrington after such transportation had been accomplished.” (Assignment of Error No. 130; Transcript of Record, pp. 97-98, 395, 410-411.)

People v. Black, 147 Cal. 426.

“If you find from the evidence beyond all reasonable doubt that the defendant did transport and cause to be transported the said Marsha Warrington, as alleged in the first count of said indictment, but also find that the purpose of said transportation and taking away was to avoid any possible disgrace either to himself or to the said Marsha Warrington from public exposure of his former relations

with the said Marsha Warrington, or from any other cause, then it is your duty to find the defendant not guilty of the first count of said indictment, however immoral said former relations may have been.” (Assignment of Error No. 131; Transcript of Record, pp. 98, 395, 411.)

“You are further instructed that before you can convict the defendant under the second count of the indictment, you must be satisfied beyond all reasonable doubt not only that the defendant, Maury I. Diggs, transported and caused to be transported the said Lola Norris, but also that such acts were done for the purpose that the said Lola Norris should be and become the concubine and mistress of one F. Drew Caminetti; and, if the prosecution fails to prove beyond all reasonable doubt that it was the purpose of the said F. Drew Caminetti to make the said Lola Norris his mistress and concubine, and that the defendant, Maury I. Diggs, knew of such purpose, and transported or caused such transportation for such purpose, it is your duty to find him not guilty of the second count of said indictment.” (Assignment of Error No. 132; Transcript of Record, pp. 98, 395, 411-412.)

“You are instructed that before you can convict the defendant upon the third count of the indictment the prosecution must not only prove to your satisfaction beyond all reasonable doubt that the defendant procured and obtained the ticket in question, but they must prove beyond all reasonable doubt that such ticket was procured and obtained for the purpose and with the intent that the said Marsha Warrington should be and become the concubine and mistress of the said defendant; and

if the prosecution fail to prove to your satisfaction beyond all reasonable doubt that said ticket was bought for such purpose and with such intent, but on the contrary, defendant procured and obtained such ticket for some other purpose and with another intent, you cannot convict him of the third count but must acquit him." (Assignment of Error No. 133; Transcript of Record, pp. 99, 395, 412.)

"The Court instructs you that before you can convict the defendant upon the fourth count of the indictment herein, the prosecution must not only prove to your satisfaction and beyond all reasonable doubt that the defendant procured and obtained, and caused to be procured and obtained the ticket mentioned in said fourth count of said indictment, but that they must prove beyond all reasonable doubt that at the time the said ticket was so procured and obtained, there existed in his mind the intent and purpose that the said Lola Norris should be and become the mistress and concubine of the said F. Drew Caminetti; in the event that the prosecution prove to your satisfaction that the said Caminetti intended to and purposed to make said Lola Norris his concubine and mistress, the prosecution must prove that the said intent and purpose existed in the mind of the said Caminetti, and if the prosecution fail to so prove beyond all reasonable doubt, you must acquit the defendant." (Assignment of Error No. 134; Transcript of Record, pp. 99-100, 395, 412-413.)

"Evidence has been introduced that prior to the trip to Reno certain persons in Sacramento communicated to the defendant the information that he and Marsha Warrington

were about to be arrested and brought before the Superior Court of Sacramento County, and that the defendant communicated such information to Marsha Warrington. The evidence has also been introduced tending to show that the defendant believed such information to be true and that it produced in his mind a condition of fear, and that by reason of such condition of mind he determined to leave Sacramento, and that he communicated such intention to Marsha Warrington, and that she, voluntarily and without inducement, enticement or solicitation on his part, insisted on accompanying him to avoid arrest, and that it was not his purpose that Marsha Warrington should become his mistress or concubine as charged in the indictment, it will be your duty to return a verdict of not guilty." (Assignment of Error No. 150; Transcript of Record, pp. 106, 395, 420.)

"Evidence has been introduced tending to show that the purpose of defendant in going from Sacramento to Reno in the company of Marsha Warrington was to avoid the notoriety that the defendant expected would result in the publication in a newspaper of certain facts of a scandalous nature. You have the right to consider such evidence as tending to show the intent and purpose of the defendant. If it satisfies your mind that the purpose of the defendant of the alleged transportation of Marsha Warrington was not that charged in the indictment, it will be your duty to return a verdict of not guilty." (Assignment of Error No. 151; Transcript of Record, pp. 106, 395, 421.)

“The Court instructs the jury that the indictment charges that the purpose of the alleged transportation of Marsha Warrington from Sacramento to Reno was that she should become his mistress and concubine. It is claimed on the part of the defendant that such was not the purpose, and evidence has been introduced tending to show that reports had been made to defendant that certain facts were to be made public in Sacramento, and that for the purpose of escaping the notoriety that would follow publicity, the defendant intended to leave Sacramento for a brief period, and that it was no part of his purpose to have Marsha Warrington as his concubine or mistress. If you believe that the purpose of the defendant was not as charged in the indictment, it will be your duty to bring in a verdict of not guilty.” (Assignment of Error No. 152; Transcript of Record, pp. 107, 395, 421.)

“Certain evidence has been introduced tending to show that the defendant was a married man at the time the acts alleged in the indictment are alleged to have been committed. The Court instructs you that this evidence was introduced and received solely for the purpose of showing motive. The fact that the defendant was a married man does not make this case any different from that of an unmarried man under similar circumstances. The law makes no distinction between the acts of a married man and those of an unmarried man nor is a married man under the law with which the defendant is charged held to any higher degree of responsibility than an unmarried man.” (Assignment of Error No. 154; Transcript of Record, pp. 107-108, 395, 422-423.)

As was well said by the Supreme Court of the State of California in the case of *People v. Keefer*, 65 Cal. 232:

“However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true.”

So, in the case at bar, the defendant was entitled to some of the instructions requested by him upon the theory that his testimony was entirely true and that he did not leave Sacramento with Marsha Warrington or Lola Norris with the intent and purpose alleged against him in the indictment.

In order to determine whether the trial Judge should have given any of the instructions above requested, it is important to ascertain just what the trial Judge did instruct the jury on the subject of the specific intent denounced by the “White-slave traffic Act.” We set this out in full.

The learned trial Judge charged the jury as follows:

“You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of the intent so alleged is made essential under the statute to constitute an offense, that is, that the act be committed to accom-

plish the immoral purpose denounced. It is therefore essential to the guilt of the defendant under any one of these counts that this intent be made to appear. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Indeed if such were not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men, committing a wrongful act, do not ordinarily proclaim in any open, definite manner the real purpose of intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established." (Transcript of Record, pp. 378, 379.)

The trial Judge further instructed the jury, on the question of intent and purpose, in the following language:

“The evidence is all before you, and it is for you to say where the truth rests. The defendant has taken the stand in his own behalf, and, so far as his testimony tends to cover the transaction involved in the charges against him, it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy, he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested the idea of leaving Sacramento alone she protested that she should not be left behind, but should go with him; and that it was she, and not the defendant, who insisted that Miss Norris should accompany them. Now this conflict, so far as it exists, is for you to determine; that is, you will say whether the statements of these girls are true, or that of the defendant, to the extent that you find it material to determine in order to reach your verdict. The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution. After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken,

and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; *since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.*

If you find that these girls were taken to Reno by the defendant and his companion Caminetti in the manner charged, then the only question remaining is as to the intent with which they were so taken. As to this question, if the evidence of the defendant and his wit-

nesses as to the reasons actuating him in leaving Sacramento, and the intent he had in mind, is not such as appeals to your hard, practical reason and common sense, in the light of the other evidence and when all his acts are considered, you are not compelled to believe it, no matter how strongly asserted. There is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. Therefore, if you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Caminetti co-habited with them, as the testimony tends to show, then you may find that they were taken there with the immoral purpose and intent charged. That is, if the declarations of the defendant as to his intent and purpose do not accord with his acts you may discard his words if they do not carry conviction to your minds, and base your finding as to his intention upon the acts committed by him.

And even if you find that the defendant and his companion Caminetti were actuated in their departure or flight from Sacramento by fear of exposure or arrest, but that nevertheless in taking these two girls with them there existed the intention to subject them to the immoral purpose charged, the defendant is guilty. If that immoral purpose was one factor inducing him to leave Sacramento and take these girls with him, it matters not that he may also have been actuated by his fears or other consideration moving him to take that trip. He would nevertheless be guilty." (Transcript of Record, pp. 389-392.)

The first criticism, that we have to offer to the instructions to the jury as given by the trial Judge, is that he did not give sufficient prominence to the element of "reasonable doubt." (See Assignments of Error No. 157, 158, 159, 160; Transcript of Record, pp. 109-111, 394.)

The instructions requested by us, which were refused, made it very clear to the jury that the question of specific intent and purpose was one of the most material ingredients of the offenses charged and that the government was bound to prove the specific intent and purpose of the defendant *beyond "reasonable doubt."*

Nor did the trial Judge give sufficient prominence, in his charge to the jury, to the various features revolving around the main contention of the defendant, to-wit: that he left Sacramento to escape impending notoriety, scandal, disgrace and probable arrest as well as fear of bodily harm.

With all due deference to the learned Judge, we incline to the opinion that this portion of the charge, as to the intent and purpose of the defendant, was much too favorable to the government and did not do the defendant full and impartial justice. The trial Judge should have given at least some of the instructions

requested by the defendant as to his intent and purpose in leaving Sacramento. The jury should have been fully advised as to the various features of this all-important question in the case. It is to be observed that the trial Judge gave great prominence to the relations existing between the defendant Diggs and Marsha Warrington after their arrival at Reno and during their temporary sojourn of three days in a bungalow at Reno. He said, among other things:

“Therefore, if you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Caminetti cohabited with them, as the testimony tends to show, then you may find that they were taken there with the immoral purpose and intent charged. That is, if the declarations of the defendant as to his intent and purpose do not accord with his acts you may discard his words if they do not carry conviction to your minds, and base your finding as to his intention upon the acts committed by him.” (Transcript of Record, p. 391.)

This charge to the jury was certainly prejudicial to the defendant. The trial Judge could have modified his remarks, and placed before the jury the question of intent and purpose more fully and fairly to the defendant by also giving some of the instructions which were refused.

Furthermore, the charge as given was radically erroneous, as already pointed out in subdivision I of this Opening Brief, in instructing the jury, after some slight reference to the evidence on behalf of the defendant, as follows:

“And if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; *since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.*” (Transcript of Record, pp. 390-391.)

It is difficult to escape the conclusion that the effect of the trial Judge's charge to the jury, especially on the question of the intent and purpose of the defendant in leaving Sacramento, was to belittle and disparage the defense. This would have been obviated, to some extent at least, had the learned trial Judge given some of the instructions requested by the defendant. The evidence presented in the case, both on behalf of the prosecution and the defendant, justifies us in claiming that the trial Judge committed reversible error in refusing

to give at least some of the instructions requested on behalf of the defendant on the all-important question of the intent and purpose of the defendant in leaving Sacramento.

XIII.

THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY AS FOLLOWS:

“The evidence introduced before you by the Government, if believed by you, is sufficient in legal effect, that is, in law, to sustain the conviction of the defendant upon each one of the several counts of the indictment, but whether it is such as to satisfy you of its truth and establish the guilt of the defendant to the degree I have indicated is, as I have heretofore stated, a question solely for your consideration.” (Assignment of Error No. 163; Transcript of Record, pp. 114, 389, 394.)

The trial Court’s instruction to the jury was entirely too strong and amounted, practically, to an instruction to convict.

In the case of *Breese v. United States*, 108 Fed. 804, being a decision by the Circuit Court of Appeals for the Fourth Circuit, it was held that an instruction, on a trial for violating the banking law, that, “in his opinion, it was the duty of the jury to convict the defendant,” was ground for new trial, as calculated to mislead the jury, who would, perhaps, construe the language as a direction on the part of the Court.

We respectfully submit that such comments, incorporated in the trial Judge's charge, must have had a deep effect upon the jurors and were highly prejudicial to the defendant. In fact, a perusal of the entire charge, as well of the rulings throughout the trial, compels us to state that the trial Judge believed the defendant guilty on all counts of the indictment and considered it proper to impart his views, to that effect, to the jury. We respectfully submit that, under the circumstances disclosed by the record in this case, what the learned trial Judge said to the jury was not only a plain and open declaration to the jury that the trial Judge was convinced of the guilt of the defendant, but that his language and remarks were tantamount to an instruction to convict. Although the attorneys for the defendant took timely exception to this portion of the charge (Transcript of Record, p. 394), and did so in the presence of the jury, the trial Judge refused to temper or soften his remarks to the jury and instructed the attorneys for the defendant not to "argue your exceptions. Just state what your exceptions are. You need not give your reasons for excepting." (Transcript of Record, p. 394.)

See particularly, on this subject, the language of the Court of Appeals of New York, in the leading case of *People v. Becker*, 104 N. E. Rep. 396, 409:

“The rule of discretion to which we have referred as abiding with a trial judge rests for its foundation upon the conception of a judgment exercised at every stage with open mind, fairly and impartially and in the interest of exact justice between people and accused, and when we find extending throughout a trial a series of rulings so repeatedly and consistently adverse to one side even upon reasonable requests as to indicate that the trial judge has yielded, however unconsciously, to a feeling of hostility and with whatever praiseworthy motives to the thought that presumptively justice will be best subserved by generally and constantly denying the requests of one side, we must conclude that there has been a loss of that open-minded discretion and well-balanced judgment which the law contemplates, and the party who has been injured by such abandonment is entitled to relief. It is at once a compliment and a heavy responsibility, the influence which an able and forceful trial judge may exert in a case of life and death on the minds of the jurymen who are alert to discover the impressions produced upon his more experienced mind by the course of the trial, and when his attitude, although unintentionally, seems to portray hostility to and disapproval of one side there can but result an impairment of that free and unbiased verdict which under our system of jurisprudence is regarded as essential to the administration of justice.

“The fundamental demand of our law is that the accused shall have a fair trial, and if that right has been infringed, not in respect to mere technicalities, but in substantial matters, and however undesignedly, he shall have another opportunity to meet his accuser and establish his innocence. That in our opinion is the present case. Under the rulings of the court the defendant did not have that manner of trial which the law guaranteed to him. His counsel was hampered and embarrassed; his case was discredited and weakened; full and impartial consideration by the jury was impeded and prevented. He never had a fair chance to defend his life, and it would be a lasting reproach to the state if under those circumstances it should exact its forfeiture. *People v. Wood*, 126 N. Y. 249, 269, 27 N. E. 362; *People v. Barberi*, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; *People v. Davey*, 179 N. Y. 345, 347, 72 N. E. 244; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Freeman*, 203 N. Y. 267, 271, 96 N. E. 413; *People v. Kinney*, 202 N. Y. 389, 397, 95 N. E. 756.

“The principle of what was written by Judge Werner in the Davey case, although said under other circumstances and in the case of a different crime than murder, is cogently applicable. The case was one where from the nature of the offense charged some of those feelings of popular prejudice and passion were liable to be aroused which it is contended were not lacking in the present case. He wrote: ‘There are cases, however, to which apparently technical errors may be so prejudicial as to produce the gravest injustice. This may be

particularly true of a case in which a defendant, accused of an abhorrent and detestable crime, finds himself confronted at the very threshold of the courtroom, with that subtle, pervasive, and almost ineradicable prejudice which the bare charge of such a crime may engender against him, in the minds of those who are to pass upon his guilt or innocence.

* * * In such cases reason needs to be safeguarded from prejudice by everything that caution and justice can suggest, * * * so that jurors may, as far as possible, be unbiased and impartial.'

"And as was again said by Judge Vann in *People v. Wolf*: 'An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. However strong the evidence against the defendant may be, if she did not have a fair trial, as shown by the rulings of the court, * * * the judgment of conviction should be reversed and a new trial ordered so that she may be tried according to law.' 183 N. Y. page 472, 76 N. E. page 594."

That serious errors, justifying a new trial, were committed by the trial Judge, is, we respectfully submit, clearly revealed by the record. As was well said by the Circuit Court of Appeals for the Eighth Circuit, in the case of *Pettine v. Terr. of New Mex.*, *supra* (at page 492):

"The legal presumption is that error produces prejudice, and it is only when the fact

so clearly appears to be beyond doubt that an error challenged did not prejudice, and *could not have prejudiced*, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable."

Citing:

Deery v. Cray, 5 Wall, 735, 807, 808, 18 L. Ed. 653;

Peck v. Heurick, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302;

Smith v. Shoemaker, 17 Wall. 630, 639, 21 L. Ed. 717;

Moore v. Bank, 104 U. S. 625, 630, 26 L. Ed. 870;

Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62;

Railroad Co. v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299;

Mexia v. Oliver, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602;

Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006;

Railroad Co. v. McClurg, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863;

Association v. Shryock, 20 C. C. A. 260, 114 Fed. 458;

Armour & Co. v. Russell, 75 C. C. A. 416, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 602;

People v. Becker, 104 N. E. Rep. 396.

Before this Appellate Tribunal can affirm the judgment of conviction now standing against the defendant, it must be "*able to say*

with certainty,” “that the defendant was not prejudiced” by the rulings, remarks and instructions complained of by the defendant.

To use the apposite language of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Balliet v. United States*, 129 Fed. Rep. 689, 696:

“Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that the defendant was not prejudiced by the instruction.”

XIV.

THE COURT ERRED IN NOT GRANTING THE MOTION MADE ON BEHALF OF THE DEFENDANT AT THE OUTSET OF THE CASE TO TRANSFER THE TRIAL OF THE CASE TO SACRAMENTO, WHERE THE OFFENSES WERE CHARGED IN THE INDICTMENT TO HAVE OCCURRED AND WHERE THE DEFENDANT AND THE PRINCIPAL WITNESSES ALL RESIDED.

(Transcript of Record, pp. 58, 131, 134, 135-140; Assignment of Error No. 25.)

This motion was made at the proper time and, in fact, at the earliest possible stage of the case. While a matter addressed to the sound discretion of the trial Judge, still, in view of the showing made, the motion to transfer should have been granted.

Section 72 of the Judicial Code provides:

“The State of California is divided into two districts, to be known as the Northern and Southern Districts of California. * * * Terms of the District Court for the Northern District shall be held at San Francisco on the first Monday of March, and the second Monday in July, and the first Monday in November; *at Sacramento* on the second Monday in April; and at Eureka on the 3rd Monday in July.”

It was under this section that the defendant Diggs appealed to the Court to transfer the trial to Sacramento.

The record shows that on July 30, 1913, the defendant was "called for arraignment." (Transcript of Record, p. 130.) On that day, a demurrer was interposed and one of the grounds urged was that the defendant should be tried at Sacramento, the place alleged in the indictment where the offenses were committed and where the defendant and the principal witnesses both for the prosecution and the defense resided. The trial Judge was perfectly correct in holding that the motion to transfer the trial to Sacramento was not a ground of demurrer and we acquiesced in his decision upon that point. (Transcript of Record, pp. 131-134.) However, upon that day (July 30, 1913), we advised the Court that we would reserve the right, before the trial came on, "to make a proper showing to the Court for the purpose of trying the case at the place where the crime was alleged to have been committed." (Transcript of Record, p. 134.) Thereafter, on August 5, 1913, counsel for the defendant renewed the motion to transfer the case to Sacramento for the purpose of trial.

The affidavit of the defendant Diggs, filed

in support of the motion to transfer the trial, omitting the caption and attestation, etc., is as follows:

“That he is the defendant in the above entitled action; that the indictment against him contains six counts; that in each count, the offense is alleged to have been committed by the defendant at Sacramento, State and Northern District of California; that, under and by virtue of Section 72 of the Judicial Code of the United States,—‘terms of the District Court for the Northern District of California shall be held.....at Sacramento on the second Monday in April.’

“That this defendant now respectfully demands to be tried at Sacramento, State and Northern District of California; that he invokes his constitutional rights to be tried at the place where the offenses are alleged to have been committed, and by the Court duly authorized by law to hold court at said place where the said alleged offenses are charged to have been committed; that he desires to be tried by a jury selected from the vicinage of the place where said offenses are alleged to have been committed; that he has a meritorious defense to said accusations made against him; that he has consulted attorneys at law who have advised him that he has a meritorious defense;

“That his residence, home and place of business have been, and now are, at Sacramento, State and Northern District of California, and not at San Francisco, where it is now proposed to try him; that most of his relatives and immediate members of his family, friends and ac-

quaintances live in, and around Sacramento, and not in San Francisco; that to compel him to be tried in San Francisco, California, will greatly and seriously and materially hinder, embarrass and jeopardize the defendant's rights and such defenses as he may deem proper to present, and as this defendant is informed and believes and as he has been informed and advised by his counsel, and therefore avers will deprive him and prevent him from properly and adequately and fully presenting his defense to said charges and in that behalf, this defendant deposes that he is without sufficient means to defray the expenses absolutely necessary to subpoena witnesses from Sacramento, California, and elsewhere, to San Francisco, and to pay for their transportation, maintenance and subsistence from Sacramento, California, and elsewhere, to San Francisco; that this defendant will require the attendance of about twenty witnesses from Sacramento and about ten from Reno, Nevada; that most of the witnesses required by this defendant to properly present his defense, reside in Sacramento, California; that, as this defendant is informed and believes, the material witnesses, upon whose testimony the Government relies, live in Sacramento, California; that it would save great expense to the Government, and to the defendant, insofar as the presence of witnesses is required, by trying the case at Sacramento, and not at San Francisco; that for the convenience of witnesses, both for the Government and the defendant, and to save great and unnecessary expense, the place of trial of this defendant should be held at Sacramento, and not at San Francisco; that this defendant is absolutely without means to sub-

poena witnesses from Sacramento, and elsewhere, to San Francisco, and to pay for their transportation, maintenance and subsistence, during the pendency of the trial, which, as this defendant is informed and believes, will require at least one week or ten days; that unless the trial is held at Sacramento instead of San Francisco this defendant will be deprived of a fair and impartial trial, and denied due process of law, and his liberty jeopardized, and he will be unable to make a proper defense to said offenses, and he might be convicted of offenses of which he is not guilty.” (Transcript of Record, pp. 135-137.)

The prosecution did not attempt to make a counter showing. Therefore, the statements of fact contained in the affidavit of the defendant Diggs must be accepted as true, and, under the showing therein made, the trial Judge should have granted the motion to transfer the trial of the case from San Francisco to Sacramento. The indictment alleged that the offenses were committed in Sacramento. The defendant and his family resided in Sacramento. The principal witnesses for the prosecution, Marsha Warrington and Lola Norris and others, resided in Sacramento. Almost every witness called on behalf of the defendant, as a perusal of the Transcript of Record will show, resided in Sacramento.

Section 72 of the Judicial Code was an express provision by Congress that Court should be held at Sacramento. It was undoubtedly the purpose of the law that all crimes and offenses committed at or near Sacramento should be tried there. This provision was enacted in the interests of convenience and economy on the part of the Government as well as of a defendant, and also in the interests of justice and so as not unnecessarily to harass or jeopardize a defendant's rights by compelling him to go to a distant part of a State (for instance such as is the large State of California), for trial and at great expense to bring his witnesses from their homes to testify. It is fundamental in English and American jurisprudence that one accused of crime is entitled to be tried by a jury selected from the vicinage of the place where the crime is alleged to have been committed. We understand that in other judicial districts motions to transfer for trial are granted as a matter of course. As above stated, the prosecution attempted no counter showing whatever. It is respectfully submitted that the defendant was unreasonably handicapped in his defense in being compelled to go to trial in San Francisco instead of Sacramento, and, as stated in

his affidavit, was "deprived of a fair and impartial trial, and denied due process of law, and his liberty jeopardized and he (was) unable to make proper defense to said offenses." (Transcript of Record, p. 150.) There was no substantial reason to justify the trial Judge in refusing to grant the motion to transfer the trial of the case. The offenses charged, if they were committed at all, took place, as alleged in the indictment, *at Sacramento*. The defendant and his family and all his principal witnesses lived *in Sacramento*. The principal witnesses for the prosecution lived *in Sacramento*. Those that did not, lived in Reno, Nevada, and it was certainly in the interests of economy to the Government and also of time that the trial should have taken place *at Sacramento* instead of San Francisco, as Reno is nearer Sacramento than it is to San Francisco by one hundred miles. Considering the averments of the indictment and the allegations of the affidavit of the defendant, which were not denied or controverted by the prosecution, it is respectfully submitted that the trial Judge abused the discretion reposed in him in not granting, upon the mere timely suggestion of the attorneys for the defendant, the motion to transfer the trial of the case from San Francisco to Sacramento.

Section 7 of the bill of rights in the state constitution of 1879 provides that: "The right of trial by jury shall be secured to all, and remain inviolate." This means the right as it existed at common law, and includes *the right to be tried in the county where the crime is charged to have been committed*, as well as to having a jury of the vicinage.

People v. Powell, 87 Cal. 348; 25 Pac. 481.

XV.

THE ACT OF CONGRESS OF JUNE 25, 1910, (36 Stat. 825), DESIGNATED AS THE "WHITE-SLAVE TRAFFIC ACT," IS UNCONSTITUTIONAL.

This point is raised both on demurrer and motion in arrest of judgment.

(Assignments of Error Nos. 1-17 incl.)

We presume again to advance this contention and to save the point, although we are aware that the Supreme Court of the United States has decided, as applied to the circumstances in the cases that have come before the court, that the "White-slave traffic Act" is constitutional.

Hoke v. United States,
Athanasaw v. United States,
Bennett v. United States,
Harris v. United States.

We will not attempt, in view of the decisions of the Supreme Court of the United States, upholding the constitutionality of the "White-slave traffic Act," to do more than to state the points on which we rely in support of our contention that the "White-slave traffic Act" is unconstitutional and infringes on the police power of the states.

The "White-slave traffic Act" is claimed to derive its constitutional sanction from Subdivision 3, of Section 8, of Article I of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

We contend that "persons" are not subjects of commerce.

New York v. Miln, 11 Peters, 102;

License Cases, 5 How., p. 599;

Bowman v. Chicago & C. R. Co., 125 U. S. 489.

Congress has no power or authority to punish prostitution within the States.

Congress has no authority to legislate or to make a criminal act anything which may be done in a sovereign state by any person.

The only power Congress has over any person is while such person is "in transitu."

Lemon v. The People, 26 Barb., (N. Y.) 270; aff. in 20 N. Y. 562.

Congress has not prohibited prostitutes from traveling.

The Supreme Court of the United States has repeatedly declared that commerce among the several States shall be "free and untrammelled."

Welton v. State of Missouri, 91 U. S. 275;

Hall v. DeCuir, 95 U. S. 485;

Weber v. Virginia, 103 U. S. 344;

Passenger Cases, 7 Howard, 283;

King et al. v. American Transportation Co., 14 Fed. Cases, 512;

Boyse v. Anderson, 2 Pet. 150.

Without further elaborating on this contention, we respectfully submit that the "White-slave traffic Act" is unconstitutional and infringes on the police power of the States.

XVI.

THE TRIAL COURT ERRED IN NOT HOLDING THAT THE FACTS PROVED BY THE PROSECUTION, ASSUMING THEM TO BE TRUE, DID NOT CONSTITUTE SUCH AN OFFENSE AS WAS INTENDED BY CONGRESS TO BE PROSECUTED BY VIRTUE OF THE ACT KNOWN AS THE "WHITE-SLAVE TRAFFIC ACT," NOR DOES THE PREVENTION AND PUNISHMENT OF THE THINGS PROVEN FALL WITHIN THE SCOPE OF THE PURPOSE FOR WHICH THAT ACT WAS INTENDED AND WHICH THE DEFENDANT IS CHARGED WITH HAVING VIOLATED, IN THAT THERE WAS NO EVIDENCE TO SHOW THAT THE DEFENDANT PROFITED BY OR EXPECTED TO OR INTENDED TO PROFIT IN OR SHARE IN ANY PROFIT ENSUING OR ARISING IN PURSUANCE OF THE TRANSPORTATION SET OUT IN THE FIRST^{FOUR} COUNT^S OF THE INDICTMENT, UPON WHICH DEFENDANT WAS CONVICTED.

This question is raised by Assignments of Errors numbers 1, 2, 3, 4, 5, 9, 10, 12, 13, 14, 15, 17; also by the motion to instruct the jury to acquit; also by motion in arrest of judgment. (See Transcript of Record, pp. 30-33; 45, 46, 47, 48, 412-414.)

These assignments of errors distinctly raise the proposition that acts of immorality, such as is claimed by the prosecution to have been established in the case at bar, are not within the letter or spirit of the "White-slave traffic Act."

This is, confessedly, not a case of commercialized vice. The first four counts of the indictment, upon which the defendant was convicted, do not allege facts of commercialism in the transportation of Marsha Warrington or of Lola Norris, or that defendant intended to profit financially thereby. They do not charge that he is a "White-slaver." They do not set forth any facts which place him in the category of a "White-slaver." Marsha Warrington or Lola Norris is not alleged to have been the victim of a "White-slaver" or "White-slave plot." It is merely charged that the purpose of the defendant, in the transportation, was that the "said Marsha Warrington should be and become the concubine and mistress of the

defendant," and Lola Norris the concubine and mistress of Caminetti. There was not the slightest pretense, during the taking of the voluminous testimony, that the purpose of the defendant savored in the slightest degree of commercialism or that his conduct, in connection with the transportation of Marsha Warrington, or of Lola Norris, was anything more than an escapade or elopement. There was not the slightest pretense that in all their actions, Marsha Warrington and Lola Norris did not act willingly and of their own free will and accord. The whole theory of the case of the Government was that although they may have consented, and even begged to go, or induced the defendant to go, still he is guilty from the mere fact that he went with them.

We are, therefore, brought to the threshold of the second proposition advanced in this Opening Brief, and that is *that*, as the facts adduced by the prosecution do not make out a case of commercialized vice or of "white-slavery," or that the defendant profited financially, or expected to profit financially, or share in any profit ensuing, or arising, or expected to arise, from the transportation of Marsha Warrington or Lola Norris and because of any subsequent immoral act or conduct on her part,

there can be no violation of the "White-slave traffic Act." In other words, we contended that the "White-slave traffic Act" was intended by Congress to apply only to cases of commercialized vice of "white-slavery," and not to "des affaires-de-cœur" or escapades such as the facts disclose in the case at bar.

In support of this contention, which we do not understand to have been directly raised in any previous case either in the Supreme Court or the Circuit Court of Appeals, it will be necessary to examine closely the provisions of the "White-slave traffic Act" and to refer, briefly as possible, to the history of its enactment and the debates of Congress with reference thereto.

The defendant respectfully contends that the "White-slave traffic Act," *as construed by the trial court, is unconstitutional*; and he further contends that the *facts disclosed at the trial could not in any event constitute a crime under the said Act.*

In stating these points for argument and elucidation, we are not unmindful of the rulings of the United States Supreme Court in the cases of *Athanasaw v. U. S.*, 277 U. S. 326; *Hoke v. U. S.*, 227 U. S. 308; *U. S. v. Bitty*, 208 U. S. 393; nor the several other federal cases construing the Act and reported in the Federal Reporter.

We ask the indulgence of the Court, if we revert to elementary rules of construction and interpretation; but the gravity of the case compels us to present the argument in as clear a light as possible that no injustice may be done the accused.

The Courts will take judicial notice that the traffic in girls and women as prostitutes for gain is a species of illicit commerce. This traffic reached such alarming proportions and became such a menace to society generally that it became necessary for the governments of the world to take formal steps to suppress it. To that end, a conference of nations was called and held in Paris. As a result of that conference the different nations represented, upon July 25th, 1902, entered into "an agreement or project of arrangement for the suppression of the white-slave traffic, * * * for submission to their respective governments." This agreement was made public within the United States, by proclamation of the President, upon June 18th, 1908.

35 U. S. Stat. at large, pt. 2, pages 1979-1984.

For the purpose of carrying out the terms of that international agreement, the "White-slave traffic Act" was passed. It was approved June 25th, 1910.

36 U. S. Stat. at Large, 825.

The Courts will further take judicial notice of the illicit traffic as condemned, exposed and generally commented upon in the daily press, magazine articles and books; also as depicted in theatrical plays and moving picture-shows generally immediately preceding and contemporaneous with the passage of the Act.

From these different sources and from general public and private discussions, the terms "white-slave," "white-slaver," and "white-slave-traffic" have now each received a definite meaning in the English language, of which, again, the Courts will take judicial notice.

The Funk & Wagnalls New Standard Dictionary of the English language (New York & London, 1913) thus defines "white-slave":

(Title "slave") "a girl *sold into captivity*." "White slavery," under the title "slavery," is thus defined by quotation: "White slavery, as popularly understood, is that condition to which young and innocent girls are debased when *sold into captivity* for immoral purposes.

"Judge Thomas T. C. Crain in General Sessions, New York, May 26, 1910."

Judge Russell, in *U. S. v. Hoke*, 187 Fed. 992, on page 1002, makes use of the term "white-slaver" in the following sentence:

“If a state when considering legislation for the suppression of prostitution within its own limits may properly take into view the evils that inhere in that degrading vice, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by allowing the *white slaver* to transport women and girls from one state to another for the purpose of prostitution and debauchery?”

We thus clearly perceive that there was loud and popular call all over the civilized world for legislation to root out the evil. The popular demand resulted in the enactment by Congress of the Act of June 25, 1910, the Act under which the defendant was convicted.

Sedgwick on Statutory & Constitutional Law says:

“On the other hand, there is no doubt that very eminent judges have, in the construction of statutes, been wont to permit their minds to be influenced, and in fact to take a sort of judicial cognizance of many intrinsic facts, in regard to which evidence certainly would not have been permitted, and which, indeed, could not perhaps be proved.

“The English statute, 26 Geo. 11, c. 23, declared all marriages of children under age void, unless the consent of the parents or guardians was first obtained. The question was brought before the Kings Bench, whether the act was to be interpreted to include illegitimate children; and Lord Mansfield, in holding that it did so, put his decision on the ground of the mischiefs which the act was intended to ob-

viate: "This act was passed in order to prevent the illegal practice of clandestine marriages, which were become so very enormous, that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The Court of Chancery, on the ground of its illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief."

Sedgwick on Statutory & Constitutional
Law, pages 241-242.

Let us look at the Act.

Section 6 recites the Paris Agreement, the President's proclamation by which it was published to the people of the United States, and the designation of the Commissioner-General as the official in charge of the foreign branch of the traffic, and clearly relates to prostitution and debauchery as a business or commerce and not voluntary sexual intercourse free from any feature of profit or remuneration.

Section 8 classifies the whole Act under one subject and entitled it the "*White-slave traffic Act.*"

Sections 2, 3 and 4 define what acts shall be deemed crimes under the Act and provide penalties for their respective violations.

Sections 1 and 7 define words used in the Act; and Section 5 prescribes the venue for trials.

The true purpose and scope of the "White-slave traffic Act" is nowhere better stated than by Representative Mann of Illinois, the proponent of the "White-slave traffic Act," in submitting to Congress the report from the Committee on Interstate and Foreign Commerce in favor of the adoption of the bill then pending, which subsequently became the "White-slave traffic Act." We set out just such portions of this report as are apposite to this particular phase of our argument:

"THE WHITE SLAVE TRADE:

"A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a *villainous interstate and international traffic in women and girls*. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*

The evil, as a present day existing evil of widespread dimensions which has arisen, has

been given careful attention by the representatives of most of the civilized nations of the world, and has been made the subject of an international agreement. Thousands of public-spirited citizens have combined in various National and State organizations for the purpose of lending their aid in its suppression. The *white-slave trade* has been so prevalent that prosecuting officers, both State and Federal, even under inadequate and insufficient laws, have been able to secure many notable convictions. It is an *evil* which many State legislatures have attempted to regulate within the past two or three years by means of the enactment of State statutes. Inasmuch, however, as the *traffic* involves mainly the transportation of women and girls from the country districts to the centers of population and their importation from foreign nations, the evil is one which can not be met comprehensively and effectively otherwise than by the enactment of Federal laws.

Investigations conducted by Government agents disclose the fact that a national and international *traffic exists in the buying, selling, and exploitation of women and young girls for immoral purposes*. This traffic has come to be known the world over as '*the white-slave trade*.' It is referred to by the Paris conference as '*the trade in white women*.'

There are few who really understand the true significance of the term 'White-slave trade.' Most of those who have given only a casual thought to the subject have the impression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of

such a life or because they have found it an easy way to earn a living. In many cases such is not the fact. The results of careful investigation into this subject disclose the fact that the inmates of many houses of ill-fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the *business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women, who, by means of force and restraint, compel their victims to practice prostitution.* These investigations have disclosed the further fact that these women are practically *slaves* in the true sense of the word; that many of them are kept in houses of ill-fame against their will; and that *force, if necessary, is used to deprive them of their liberty.*

The characteristic which distinguishes '*the white-slave trade*' from *immorality in general* is that the women who are the *victims* of the *traffic* are *unwillingly forced to practice prostitution.* The term '*white slave*' includes *only* those women and girls who are *literally slaves*—those women who are *owned and held as property and chattels*—whose lives are lives of *involuntary servitude*; those who practice prostitution as a result of the activities of the *procurer*, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their *owners.* In short, the *white-slave trade* may be said to be the *business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes.* Its *victims* are those women and girls

who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens.

The preamble of an existing international agreement on this subject states that the several governments, 'being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known under the name of trade in white women* ('*traite des blanches*'), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose.' It is the purpose of the proposed laws, in so far as it may be possible for Congress to do so, to protect women and girls against this *criminal traffic* by providing for the punishment of those engaged in that *traffic* and by regulations established by the act.

Extensive investigation by government commissions and prosecuting officers in various parts of the country disclose the fact that in many cases involving women and girls imported into this country, and those transported from one state to another, the *procurers resort to all of the means and devices known to the criminal classes to accomplish their purposes. Liquor, trickery, deceit, fraud, and the use of force are resorted to by the procurer to place the girl under his power.* In some cases those who have been induced to come to the large cities are first introduced to the house of prostitution under the influence of liquor; in others, the *procurer* enters into a pretended marriage with his victim; in many cases involving the importation of women and girls from abroad

and their transportation from one state to another the inducement is the promise of legitimate employment with handsome compensation. *Hundreds of men in large cities live from the earnings of the victims of the white-slave trade*, and in many instances the more extensive of *international procurers live in affluence*. The books kept by a notorious importer of French girls, who was arrested in Chicago a few months ago, disclosed his earnings for the year previous to his arrest, largely from his *importation and wholly from his exploitation of girls*, to have been more than \$102,000.

The investigation into this subject conclusively shows the fact that for some time after they are first unwillingly forced to take up a life of prostitution many of the victims would at once abandon it were it possible for them to do so. The facts are that in order to insure her continuance in the degraded life, to which she has been unwillingly forced to submit, the procurer has resort to physical violence and the maintenance of a system of surveillance which makes her, to all intents and purposes, *a prisoner*. Obviously the portions of the act which require the *proprietor of a house of ill fame* to report to the Federal authorities concerning the arrival in the establishment of an alien woman or girl would, at least so far as concerns aliens, make *unlawful detention* practically impossible.

The national and international importance of suppressing this *criminal traffic* is clearly shown by reference to the treaty, the preamble of which is given above, and reports of governmental officers and others on the subject.

The Secretary of Commerce and Labor, in his annual report for 1908, page 18, refers to the matter in the following terms:

‘It is highly necessary that this *diabolical traffic*, which has attained international proportions, should be dealt with in a manner adequate to compass its suppression. No punishment is too severe to inflict upon the procurer in this vile traffic.’

The act of February 20, 1907, (Sec. 29), created an immigration commission, the membership of which was to consist of three Senators, three members of the House of Representatives, and three persons to be appointed by the President of the United States. In a preliminary report submitted February 27, 1909 (Doc. 1489), the commission says:

‘The commission has made an extensive investigation into the question of the importation and harboring of women for immoral purposes. The results show that many women are being regularly imported under conditions which often amount to *absolute slavery*.

* * * * *

‘It is believed that as a result of this investigation the commission will be able to make recommendations which will put a very decided check upon this horrible traffic, if, indeed, it will not practically break it up entirely.’

“THE TRAFFIC IS SYSTEMATIC AND EXTENSIVE.”

“Governmental investigations which have been conducted disclose the fact that the importation of women and girls from foreign countries has been systematic and continuous,

and has not been limited to isolated and accidental cases. The facts in connection with investigations conducted by the district attorney at Chicago may be taken as typical of the situation in many other cities.

At the time of the arrest of several notorious French importers in Chicago a large amount of correspondence and other documentary evidence fell into the hands of the authorities. This evidence showed beyond a reasonable doubt that there was in existence an *organized system*, or *syndicate*, having for its purpose the importation of women from foreign countries to Chicago, and other cities in the United States for immoral purposes. This syndicate had headquarters and distributing centers in New York, Chicago, Omaha, Denver, San Francisco, Los Angeles, Seattle, and Nome, Alaska.

It is conservatively estimated, from an examination of the data and information at hand, that the *syndicate* has imported annually during the preceding 8 or 10 years on an average of about 2,000 women,—largely French. It also appears that the syndicate regularly sent agents to Europe to *procure girls* at stated prices, to be brought to the United States, where they were placed at the disposal of the keepers of houses of *prostitution*. The usual methods employed in evading the immigration officers at the port of entry was to pass the women as the wives or sisters of the procurers with whom they arrived.

One of the chief members of this syndicate was the Frenchman Alphonse Dufaur, who was the defendant in six indictments, in the Chicago district, charging him with harboring

alien women in violation of the existing law. Dufaur and his wife subsequently forfeited bonds in the sum of \$25,000 and became fugitives from justice.

Another active importer and procurer was Henry Lair, who operates establishments in Chicago and San Francisco. One of Lair's agents was a man named Louis Paint, who some time ago was convicted of importing in New York and who is now serving a sentence of four years in the penitentiary at Atlanta, Ga., for importing women for Lair. On the recent trial of Lair, in Chicago, Paint testified that he had been given \$800 by Lair and told to go to Paris for the purpose of procuring two girls for Lair's establishment in Chicago. Lair was convicted and sentenced by Judge Landis to serve two years at hard labor in the penitentiary at Fort Leavenworth and to pay a fine of \$2,500.

Various arrests have been made in the Chicago district which disclose the existence of a *traffic in girls* from Hungary, Sweden, Norway, Denmark, Great Britain, and other countries.

In this connection it is of interest to note the *profits realized by those engaged in the importation of alien women for the purpose of prostitution*. For this purpose the information in the possession of the Government, as the result of prosecution against the French procurer, Dufaur, which is definite and accurate, may be taken as typical of the remunerative character of the *traffic*. The books of account kept by Dufaur show that *his income*, from his *establishment in Chicago*, realized largely as a result of his success as an importer,

was, for the 12 months immediately preceding his arrest, upward of \$102,000. These books also show that during the month of May, previous to his arrest, the *earnings of one girl, a recent importation*, were \$723. In almost every instance which has come to the attention of the authorities the girls who were imported from France by the *French syndicate* were compelled to turn over every day to the *proprietor of the establishment in which they were detained all their earnings*. They were usually allowed only enough to purchase the clothing necessary to make them attractive to frequenters of the place.

“INTERNATIONAL AGREEMENT FOR THE REPRESSION OF THE TRADE IN WHITE WOMEN.”

“A project of arrangement for the *suppression of the white-slave traffic* was, on July 25, 1902, adopted for submission to their respective Governments by the delegates of various powers represented at the Paris conference for the repression of the *trade in white women*.

The stipulations of this project of arrangement were confirmed by preliminary agreement signed at Paris, May 18, 1904, by the Governments of Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council.

By its resolution of March 1, 1905, the Senate of the United States advised and consented to the adhesion by the United States to the said project of arrangement, and therefore, on June 6, 1908, the President announced the adherence on the part of this Government to the project, and this adherence was on June 15,

1908, covered by the proclamation of the President. This treaty was published in pamphlet form by the State Department as Treaty Series, No. 496, and a complete copy is attached hereto as Appendix B. The preamble of this agreement recites that the various Governments, being desirous to assure to women who have attained their majority, and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known under the name of trade in white women—‘traite des blanches’*—have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose.” (See Congressional Record, Vol. 50, pp. 3368; 3370; 3371.)

Where the language of a statute is ambiguous or doubtful, it is well settled that resort may be had to the history of the act. “Both the *debates*, however, and the *reports of committees* may be consulted for the purpose of ascertaining the *general object of the legislation proposed* and the *evils* sought to be *remedied*.”

36 CYC. pp. 1138 and 1139 and cases there cited.

Holy Trinity Church v. U. S., 143 U. S. 457, 36 L. Ed. 226.

Even the *title* of the *Act* may be referred to as tending to throw light upon the legislative intent of its *scope or operation*.

Said Mr. Justice Brewer in Holy Trinity Church v. U. S., *supra*: “We find, therefore,

that the *title of the Act*, the *evil which was intended to be remedied*, the *circumstances surrounding the appeal to Congress*, the *reports of the Committees of each House*, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor."

To the same effect, see *Binns v. U. S.*, 194 U. S. 486;

Coosaw Mining Co. v. So. Car., 144 U. S. 563.

In ascertaining the intent of a statute, especially the remarks of the member in charge of the bill, are important and of value.

CYC. Vol. 36, pp. 1138, 1139;

U. S. v. Wilson, 58 Fed. 768;

Ex p. Farley, 40 Fed. 66.

The Act was passed by Congress under the grant of power contained in Art. 1, Sec. 8, subd. 3, of the Constitution,—known popularly as the "interstate commerce clause."

From what we have said, it will be apparent, without citation or argument, that the traffic in female human beings—the procuring, selling or using for financial profit—comes directly, and not by implication, within the meaning of the word "commerce" as used in the Constitution.

However, the trial court, we respectfully submit, conceived a wrong impression of the nature and scope of the Act and erroneously instructed the jury to the injury of the defendant. The only definition of "interstate commerce" given the jury by the Court will be found on page 374 of the Transcript of Record, where the Court said:

"The term interstate commerce, so far as here involved, means transportation or carrying from one state to another, and such transportation may be by means of a railroad or any other mode of carriage usually employed by common carriers of passengers."

And the Court's whole charge to the jury is based upon that erroneous definition of the term "interstate commerce" as used in the Act.

It is upon this that we predicate an assignment of error among several others on the same general subject.

A perusal of the Act will readily disclose where the Court obtained its erroneous conception.

The title of the Act is misleading. At first reading, one would readily conclude that the subject was "An Act to prohibit the *transportation* for immoral purposes of women and

girls.” Again, the first section would lead one to the same conclusion, wherein it says:

“That the term ‘interstate commerce’ *shall include* transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia.”

The subject of the Act, however, as expressed in the title, is: “An act to further regulate interstate and foreign *commerce*;” and the first section merely recites that the term “interstate” shall include state, territory and the District of Columbia. In other words, the Act is for the purpose of further regulating interstate and foreign *commerce*, and *not* an act to regulate the *transportation* of women and girls for immoral purposes, as erroneously conceived by the trial court.

Let us now elucidate by applying a few rules of construction and interpretation.

“Laws are expounded and enforced, not made, by the Courts. The makers are entitled to have their real meaning, if it can be ascertained, carried out. Hence the *primary object* of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended. Hence, also, if the Courts can ascertain the legislative meaning, their duty is to give it effect, what-

ever may be the personal opinions of the incumbents of the bench on the policy of the law."

Bishop on Statutory Crimes, 3rd Ed.
Sec. 70.

"It is indispensable to a correct understanding of a statute to enquire first what is the subject of it. When the subject matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention. * * * In the Eureka case, Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The enquiry, where any uncertainty exists, always is as to *what the legislature intended, and when that is ascertained it controls.* * * *'"

Vol. II Lewis' Sutherland Statutory
Construction, 2nd Ed. Sec. 347.

"In *United States v. Minn.*, 3 Sumn. 209, 211, Fed. Case No. 16, 740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.' To the same effect are *United States v. Morris*, 14 Pet. 464, 10

L. Ed. 543; American Fur. Co. v. United States, 2 Pet. 358, 367, 7 L. Ed. 450, 453; United States v. Lacher, 134 U. S. 624, 628; 33 L. Ed. 1080, 1083; 10 Sup. Ct. Rep. 625; Sedgw. Stat. & Const. Law, 2nd Ed. 282; Maxwell, Interpretation of Statutes, 2nd Ed. 318."

U. S. v. Bitty, 208 U. S. 393.

Reverting to the case at bar.

What was the intent of Congress in enacting "The White-slave traffic Act"? From what sources do we, or can we ascertain, such intent?

(1) The congressional intent is expressed in the title:

"An Act to further regulate interstate and foreign *commerce* * * *."

(2) The congressional intent is expressed in section 6 of the act:

"And in pursuance of and for the purpose of carrying out the terms of the agreement or propect of arrangement for the *suppression of the white-slave traffic*, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris Conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight,
* * * ."

(3) The congressional intent is expressed in section 7 of the Act, wherein it is provided that a corporation, company, society or association may be guilty of a violation of the provisions of the Act, and this rule of construction is prescribed:

“The word ‘person,’ as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any other person or by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such other person, or of such company, corporation, society, or association, as well as that of the person himself.”

(4) The congressional intent is expressed in Section 8 of the Act wherein it defines and entitles the Act as the

“White-slave traffic Act.”

“White-slave, a girl *sold into captivity* for immoral purposes.”

Standard Dictionary, *supra*.

Holy Trinity Church v. U. S., 143 U. S. 457, 36 L. Ed. 226.

(5) The congressional intent is expressed in the caption of the President’s Proclama-

tion, referred to in section 6 of the Act (35 Stat. at Large, pt. 2, p. 1979):

“Agreement between the United States and other Powers for the *repression of the trade in white women*. Signed at Paris, May 18, 1904; ratification advised by Senate, March 1, 1905; adhered to by the President, June 6, 1908; proclaimed June 15, 1908.”

(6) Also in the first paragraph of the Proclamation:

“Whereas a project of arrangement for the *suppression of the white slave traffic* was, on July 25, 1902, adopted for submission to their respective Governments by the delegates of various Powers represented at the Paris Conference for the *repression of the trade in white women*.”

(7) Also in the preamble of the International Agreement, referred to and made a part of the President’s Proclamation (35 St. at Lg., pt. 2, pp. 1980-1984):

“His Majesty the German Emperor, * *, being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as to minor women and girls, an efficacious protection against the *criminal traffic* known under the name of *trade in white women* (‘*Traite des blanches*’), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose * * *.”

(8) Also in Article 6 of the Agreement which recites:

“The contracting Governments agree, within the limits of the laws, to exercise, as far as possible, a supervision over the bureaux or agencies which occupy themselves with finding places for women or girls in foreign countries.”

(9) Further, in the action of the Senate upon the Agreement (Vol. 39 Cong. Rec., pt. 4, p. 3770):

“Repression of the *trade in white women*.

“The injunction of secrecy was removed March 1, 1905, from projects of a convention and an additional arrangement adopted on July 25, 1902, by the delegates of the various Powers represented at the Paris conference for the repression of the *trade in white women* (*traite des blanches*).”

In these several documents it will be seen that the terms “*trade in white women*” and “White slave traffic” are used interchangeably, and the words “trade” and “traffic” as being synonymous.

A few definitions may aid in bearing out our contention. They are quoted from The Century Dictionary (N. Y. 1913):

“*Slave*”—“A person who is the chattel or property of another and is wholly subject to his will; a bond-servant; a serf.”

“*Slave-trade*”—“The trade or business of procuring human beings by capture or pur-

chase, transporting them to some distant country, and selling them as slaves; traffic in slaves."

"Trade"—"8. The exchange of commodities for other commodities or for money; the business of buying or selling; dealing by way of sale or exchange; commerce; traffic."

"Traffic"—"1. An interchange of goods, merchandise, or other property of any kind between countries, communities or individuals; trade; commerce."

(10) The congressional intent is disclosed by the history of the Act, the debates in Congress and the reports of committees.

Holy Trinity Church v. U. S., 143 U. S. 457; 36 L. Ed. 226.

(11) The congressional intent is shown by the contemporaneous construction given the Act by the executive departments of the Government.

U. S. v. Ala. R. R. Co., 142 U. S. 621;

U. S. v. Finnell, 185 U. S. 236, 244; 46 L. Ed. 890;

New York v. New York City R. R. Co., 193 N. W. 543, 86 N. E. 565.

It is hardly necessary, however, to go outside the Act to ascertain the intention of Congress to suppress the White-slave traffic,—the abominable practice of enticing, coercing, buying and otherwise procuring girls to be en-

slaved in prostitution, debauchery and other immoral practices for the profit and gain of their masters—white slavers. It is not necessary to refer to the newspaper, magazine or platform demand for legislative action prior to and contemporaneous with the passage of the Act.

Could any other intent be deduced? If there can, let counsel for the United States point it out.

Having thus ascertained the “true intent of the legislature,” to use Mr. Justice Story’s language, *supra*, “we must adopt that sense of the words which harmonize best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.”

Applying this rule to sections 2, 3 and 4 of the Act, it will be seen, at a glance, that they *solely* refer to any “*person*.” But, by section 7 of the Act, the word “person” is made to include a “corporation, company, society, or association,” engaged in the interstate traffic in *white-slaves* or women to be used for immoral practices. It will not be seriously claimed that a “corporation, company, society, or association” is capable of sexual intercourse. Yet the use of the words “corporation, company, society, or association,”

shows that Congress had in mind the fact that a "corporation, company, society, or association" might engage, equally with a person, in the illicit business or commerce of bartering in girls and women for profit or gain.

We deem this conclusive.

A more appropriate title for the Act would, perhaps, have been, "An Act to further regulate interstate and foreign commerce by prohibiting therein the trade or traffic in white women to be used as slaves in commercialized vice."

None of the evidence or testimony in the case at bar attempts to prove the defendant a "white-slaver." There is not a scintilla of evidence of any, the slightest, commercialism in the case at bar. The whole theory of the case, from its inception, was based upon the erroneous conception that the Act covered all cases of immoral interstate conduct. The prosecution, as well as the Court, labored under this grossly erroneous interpretation of the Act. The erroneous conception, as we have before stated, consisted of the idea that it was an Act to regulate *transportation*—that the jurisdiction of the Court rested upon the right to regulate interstate *transportation*, instead of the right to regulate interstate *commerce*.

This leads to the construction to be placed upon the word "commerce" as used in the Federal Constitution.

We respectfully contend that the word "commerce," as employed by the framers of the Constitution, implies a means to a financial, pecuniary or other like remunerative end,—traffic or trade for emolument or compensation. That this meaning is basal. That we unconsciously imply such meaning whenever we employ the word.

Bearing this fundamental definition in mind, let us apply some elementary rules of construction and examine some of the leading cases which have construed this word in the Constitution.

"48. It is *a cardinal rule* in the interpretation of constitutions that the instrument must be so construed *as to give effect to the intention of the people who adopted it.*"

"Where the meaning shown on the face of the words is definite and intelligible, the courts are not at liberty to look for another meaning, even though it would seem more probable or natural, but they must assume that the constitution means just what it says."

"3. A constitution should be construed with reference to, but not overruled by, the doctrines of the common law and the legislation previously existing in the state."

Black's 'Constitutional Law, 2nd Ed.
Secs. 48-49.

“The court should put itself in the position of the legislature,—should stand, in contemplating the statute, where the maker of it stood—the better to discern the reason and scope of the provision. They who voted for the measure must have had in mind a meaning for the enacted words; and the meaning, thus perceived, must be given them by the Court. Thus, ‘Time,—If the statute is old, or if it is modern, the court should transport itself back to the time when it was framed, consider the condition of things then existing, and give it the meanings which the language as then used, and the other considerations, require.’ ”

Bishop on Stat. Crimes, 3rd Ed. Sec.
75.

“In a book not strictly of the legal class we read: ‘No sentence or form of words can have more than one true sense;’ and this only one we have to enquire for. This is the very basis of all interpretation. * * * Every man or body of persons, making use of words, does so in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning, and amounts to absurdity.’ ”

Same, Sec. 94.

“Adopted from other state or country.
* * * * In the adjudications on this question, no nice distinctions have been drawn; but, in a general way, it is held that a word, phrase or statutory provision, adopted from

the laws of another state, or from England, * * * will ordinarily receive the construction it had in the law whence it was taken."

"Constitution.—In pursuance of the presumed intent of the makers, a constitutional provision, adopted from another state after it had been judicially interpreted, will, in the absence of any contrary indication, retain the meaning thus previously ascertained."

Same, Sec. 97.

"Looking to the subject for the meaning, if a statute employs a word which, though not legal, is technical to its subject, we give it the technical sense,—not the general sense, not one technical to another subject,—unless something appears indicating a different intent of the legislature. Thus,—

"An act relating to commerce is interpreted by the vocabulary of merchants, not of mechanics."

Same, Sec. 99.

"Ordinarily the language is to be understood in its common signification; as, for instance, general terms are to receive their general, not restricted sense."

Same, Sec. 102.

"Our constitutions, being, like statutes, written instruments and laws, are, in the main, similarly interpreted."

Same, Sec. 92.

"Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to

considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power, —some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them.”

Oakley vs. Aspinwall, (N. Y.) 3 Coms.,
547, 568.

Having these fundamental principles in mind, we will proceed to apply them to the word “commerce” as used in the Constitution.

Our first step will be to place ourselves in the constitutional convention—revert to Philadelphia, Pennsylvania, as of September 17th, 1787,—the date of the adoption.

The next step will be to ascertain what that convention understood by the word "commerce" when the delegates caused it to be inserted into Subd. 3, Section 8, of Article 1 of our Federal Constitution.

As we have seen, resort may be had to prior laws—to the English common law—the law adopted by this country and so adopted at about that time. Therefore, the highest authority we could find to enlighten us upon the subject would be the definition given it by Blackstone himself. Sir William Blackstone completed his *Commentaries* in 1765, just twenty-two years prior to the drafting of our Constitution. No one will argue that any different meaning crept into the law during this interim. Blackstone's definition of both foreign and domestic commerce will be found on pages (original paging) 273 to 278, subdivision V. In part, it is as follows:

"V. Another light in which the laws of England consider the King with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a foreign trade, its privileges, regulations, and restrictions; and would be also quite beside the purpose of these commentaries, which are confined to the laws of England; whereas, no municipal laws can be sufficient to order and determine the very exten-

sive and complicated affairs of *traffic and merchandise*; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called *the law merchant* or *lex mercatoria*, which all nations agree in, and take notice of. And in particular it is held to be part of the law of England, which decides *the causes of merchants* by the general rules which obtain in all commercial countries; and that often, even in matters relating to *domestic trade*, as for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange.

“With us in England, the King’s prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

“First the establishment of *public marts*, or places of *buying and selling*, such as *markets and fairs*, with the *tolls* thereunto belonging. These can only be set up by virtue of the King’s grant, or by long and immemorial usage and prescription, which presupposes such a grant. The limitation of these *public resorts* to such time and such place as may be most convenient for the neighbourhood, forms a *part of economics*, or domestic polity, which, considering the kingdom as a large family, and the King as the master of it, he clearly has a right to dispose and order as he pleases.

“Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same

throughout the kingdom ; being the general criteria which reduce all things to the same or an equivalent *value*. * * *"

"Thirdly, as money is the *medium of commerce*, it is the King's prerogative, as the arbiter of domestic commerce, to give it authority to make it current. Money is a universal medium, or common standard, by comparison with which the *value of all merchandise* may be ascertained ; or it is a sign which represents the respective *values of all commodities*."

Chancellor Kent's commentaries (N. Y., Nov. 23rd, 1826) on the subject of commerce is also instructive.

Commentaries on American Law, Vol. 1, pp. 32-34 ; 431-439.

Not only in these works, but in all definitions of the word found in the text books and reported cases, the fundamental conception of the word "commerce" will be found to include a transaction for a monetary or pecuniary gain. Of course, the word is broad and includes within its meaning any ancillary subject, such, for instance, as the federal government jurisdiction over navigable waters wholly within a state.

(Act of Sept. 19th, 1890.)

In other words, as we gather from Mr. Blackstone's definition, the first principle of the word in its, perhaps we might say, barbaric sense, is trade or barter. To this, the

English law had included the subject of weights and measures and the coinage of money. Still other auxiliary subjects have also been construed as being included within the meaning of the word, but a close study of them all will disclose that the earliest conception of the word is still retained,—commercial intercourse for gain.

Judge Russell, in *U. S. v. Hoke*, 187 Fed. 992, has cited a number of cases which construe this section of the Constitution.

The first subject commented upon is that the power to regulate commerce includes the power to regulate the transportation of passengers. The jurisdiction of Congress to exercise this power in interstate travel, we do not question. We have no desire to quarrel with the United States Supreme Court regarding any of its decisions on this subject. We agree implicitly with that Court upon this subject. The common carrier of passengers is undeniably engaged in a commercial pursuit, the traffic for gain. The contract for carrying—evidenced by a ticket—is a commercial transaction and should be regulated by the State. The common carrier is engaged in a purely commercial enterprise and his business should be regulated. The passenger, as long

as his contract of carriage is executory, is, to a more or less extent, subject to observe certain rules, regulations and laws which Congress directly, or through its agents, may impose. To this extent, therefore, Congress, under this constitutional power, regulates the passenger as well as the carrier. But this regulation of the passenger has its beginning and its end in the contract of carriage—the contract for gain entered into by the common carrier engaged in a commercial enterprise. For instance: Should Congress pass a law, in furtherance of the public safety, forbidding passengers to stand upon the platform of a car while the train was in motion and prescribing a penalty to be imposed upon the passenger for its violation, it would be a constitutional law in interstate travel. Likewise, a federal interstate law forbidding expectorating on the floor or platform of an interstate train would be another instance.

But outside the scope of the contract of carriage the jurisdiction does not exist. For instance: Congress could not enact a law making it a federal offense for a person to purchase a ticket in one state, and, riding on a common carrier into another state, with malice aforethought for the express purpose of

committing the crime of murder in such other state. In such case, the regulation would be the regulation of a criminal, not the regulation of a passenger.

The subject of the law would be the prevention of and punishment for a criminal offense. The fact that the defendant was an interstate passenger would be a mere incident. The intent of Congress, as expressed in such an Act, would be to prevent and punish for crime. In no sense, could it be construed as an Act to regulate interstate commerce. It would be an attempt to usurp a purely police power, which, under our laws, is vested exclusively in the several States. The same rule would apply were the wrong merely one of immorality. Suppose the Act one where Congress attempted to make it a federal offense for a man to travel from one state into another to have sexual intercourse with a prostitute or to debauch a woman, or attend an extremely immoral exhibition. What would be the subject of such an Act? What would be the "legislative intent" as expressed in the Act? Purely an attempt on the part of Congress to suppress or regulate immoral acts and the contract of passage on the common carrier merely an incident in no manner connected with

the wrong sought to be prohibited. No barter, trade or traffic for gain would be involved in the commission of the offense itself—no act of a commercial nature would enter into the wrong doing. Congress would, in such a case, be attempting to regulate morals—not interstate travel. Again, would it make it any more of a commercial transaction should the woman to be debauched go in company with the accused? The offense would be the same and the subject of the Act identical. As said by Mr. Justice Brewer in *Keller v. U. S.* 213 U. S. 138; 53 L. Ed. 737; 29 Sup. Ct. Rep. 470; 16 A. & E. Ann. Case, 1066, at page 149, a case decidedly in point here:

“While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced.”

That Congress has police power is not to be denied; but, as Mr. Black says:

“It is true that Congress has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations.”

Black's Cons. Law, 3rd Ed. 391-2.

The same author further says (p. 435) :

“Yet a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the federal constitution, and ‘all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and consequently in relation to these, the authority of a state is complete, unqualified, and exclusive.’ ”

“A deliberate purpose to place the state police power under federal control can hardly be attributed to the framers of the constitution.”

See also :

Freund Police Power, Sec. 65.

Bishop on Stat. Crimes, 3rd Ed., Sec. 990.

Tiedman's Lim. of Police Power, Sec. 201.

The subject of the act construed in the *Rahrer* case was intoxicating liquors—a commercial subject. (140 U. S. 545, 35 L. Ed. 572.)

The subject of the *Addyston Pipe* case was iron pipe—another commercial subject. (175 U. S. 211, 44 L. Ed. 136.)

The subject of the *Popper* case was the traffic in instruments intended to prevent conception—the selling of a commercial article in interstate trade. (179 U. S. 305, 45 L. Ed. 203.)

The subject of the act construed in the Lottery cases is expressed in its title: "An act for the suppression of lottery traffic * *." A trading in lottery tickets for gain—a pernicious commercial transaction. (188 U. S. 321, 47 L. Ed. 492.)

And so on with the others mentioned: The anti-trust act; the act prohibiting the interstate trading in misbranded or mislabeled dairy products; the pure food law; the act prohibiting interstate traffic in gold and silver branded "United States Assay." These are all laws regulating commercial transactions—traffic or trade for gain—or articles of commerce—merchandise.

And, so do we agree with Judge Russell where he says, on page 1004 of the Hoke case:

"I might go ahead and mention numbers of instances where the regulatory power of Congress as contained in the Constitution has been invoked for prohibiting the transportation from place to place of certain articles, and the courts have well settled the proposition that the power of Congress to regulate the transportation of persons differs in no particular or degree from its power to regulate the transportation of property and things."

Provided, that such persons are transported in the sense of articles of commerce—subjects of remuneration to those dealing or trading in or with them—as the objects of financial or

pecuniary profit to the one transporting them. In this connection we do not mean the *common carrier*, but the *white slaver*.

Otherwise, were the Act intended to "regulate the transportation of persons," then the common carrier corporation, through its agents, would be guilty of a violation of the Act should any such agent sell an interstate ticket to a woman whom such agent knew intended to engage in prostitution, debauchery or other immoral practice—which construction would be absurd.

This latter would be the *regulation of the passenger traffic*; while the former would be the *regulation of the white-slave traffic*.

It may be contended that as one meaning of the word "commerce" is "sexual intercourse," that that is sufficient to confer upon Congress jurisdiction to regulate such intercourse among the citizens of different states.

As we have seen, a word can have but one "true meaning"—and that controls.

The word "commerce" also means "a game of cards, played in various ways." But we do not expect counsel to insist that this would confer jurisdiction on Congress to regulate interstate poker, whist or five-hundred.

We do not think it necessary to argue that neither of these meanings, nor any other meaning than the one we have given, was intended by the framers of our Constitution.

Taking all the testimony and evidence submitted in the case at bar to the jury as true, all the acts, commissions and omissions of the defendant combined would merely show an act of immorality, insofar as the United States is concerned.

That the white slave traffic is pernicious and should be stamped out, we agree. But that the Act covers mere interstate sexual intercourse immorality, we most emphatically deny. In this connection, we believe that we have conclusively shown that the view taken by the trial court, of the object and scope of the Act, is unconstitutional. That the Act covers the subject *only* which it itself expressly says it covers—the *traffic or commercial dealing in women and girls as prostitutes or for debauchery, or any other immoral practices.*” That had Congress intended that the Act should cover all interstate immoral acts, as the trial Court ruled throughout the trial and instructed the jury it did, in such a case the Act would be unconstitutional, such immoral conduct not amounting to an act of *commerce* within the meaning of the constitution.

Keller v. U. S., *supra*.

Ex parte Gouyet, 175 Fed. 230.

All the cases, in which the Act has been construed, have been cases within the object and scope of the statute as we have construed it. That being the case, none of them is in point here. As we have before said, we have no quarrel with any of the Courts which have heretofore held this law constitutional as applied to the facts disclosed in the reported cases.

Take, for example, the case of Hoke et al. v. United States, 227 U. S. 308, 57 L. Ed. 523. It clearly appears that Effie Hoke kept a house of prostitution and that the trial Court "permitted the women to testify as to the acts of Effie Hoke at her house at Beaumont, restraining the liberty of the women and coercing their stay with her." It also appeared that the women transported were prostitutes. As stated by the Supreme Court:

"There was sufficient evidence, as the trial court said, of the fact of the immorality of their lives, and explicitly ruled that they could be shown to be public prostitutes."

Furthermore, the indictment in the Hoke case charged that the transportation was "for the purpose of prostitution," whereas, in the case at bar, there is no such allegation or pre-

tense. It is simply charged that Marsha Warrington was transported for an immoral purpose, to-wit, "That the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant."

Next, take the case of *Bennett v. United States*, 227 U. S., p. 333, 57 L. Ed. 531. It appears that that, also, was a case involving the transportation of women for a commercial and immoral purpose, to-wit, prostitution.

The same is true of the case of *Harris v. United States*, 227 U. S., p. 340, 57 L. Ed. 534. That, also, was a case of commercialized vice.

Next, considering the case of *Athanasaw et al. v. United States*, 227 U. S., p. 326, 57 L. Ed. 528; it also affirmatively appears that that was a case of commercialized vice. The facts, as stated by the Supreme Court of the United States, show that the girl, in that case, was 17 years old and was transported ostensibly to become a chorus girl at the Imperial Theatre, Tampa, Florida. The theatre was operated by the defendants, and their agent or booking representative at Atlanta had engaged her and furnished her transportation. She arrived at Tampa and met the defendant Athanasaw.

"As to what then took place, the girl testified as follows: 'He showed me to my room and took the check to get my trunk. I went to sleep

and slept until 2 o'clock in the afternoon. At that hour one of the girls woke me up to rehearse. I went down in the theatre, and stayed there about an hour, rehearsing, singing, and then went to lunch in the dining room. All of the girls were there and several boys. I had never had any stage experience. At lunch they were all smoking, cursing, and using such language I couldn't eat. After lunch I went to my room, and about 6 o'clock Louis Athanasaw, one of the defendants, came and said to me I would like it alright; that I was good looking and would make a hit, and not to let any of the boys fool me, and not to be any of the boy's girl; to be his. *He wanted me to be his girl; to talk to the boys and make a hit, and get all of the money I could out of them.* His room was next to mine, and he told me he was coming in my room that night and sleep with me; and he kissed and caressed me. He told me to dress for the show that night and come down to the boxes. I went into the box about 9 o'clock. About that time Louis Athanasaw's son knocked on my door and told me to come to the boxes. In the box where I went there were four boys; they were smoking, cursing, and drinking. I sat down and the boys asked me what was the matter; I looked scared. I told them I was ashamed of being in a place like that; and Arthur Schlemann, one of the boys said he would take me out. The others insisted on my staying, and *said I would like it when I got broke in.* I tried to go out with Schlemann, but a boy named Gilbert pulled me back, saying 'Let that cheap guy alone.' Schlemann said he would send a policeman, and in about fifteen minutes Mr. Thompson and Mr. Evans came in for me.' "

That, undoubtedly, was a case of commercialized vice or a "white-slave case," within the letter and spirit of the "White-slave traffic Act." The girls in that case was transported for "the purpose of debauchery," as the indictment there alleged. There was present the element of commercialism. She was to "*get all of the money I (she) could get out of them,*" a clear case of commercialized vice.

How different are the facts in the case at bar!

Next, take the case of *U. S. v. Bitty*, 208 U. S. 393; 52 L. Ed. 543, and it will be found to be clearly distinguishable from the case at bar. The defendant, in that case, was convicted under an Act of Congress passed in the exercise of its jurisdiction with reference to *foreign immigration*. That jurisdiction is not founded upon the *commerce* clause of the Constitution, but "upon the inherent and inalienable right of every sovereign and independent nation to regulate immigration in furtherance of its safety, independence and welfare.

See note to *Keller v. U. S.*, 16 A. & E. Ann. Cas. 1069.

Even Mr. Mann, the author of the "White-slave traffic Act," differentiates the case of

U. S. v. Bitty and concedes that the facts disclosed in that case do not come within the purview of the "White-slave traffic Act." The report of the Committee on Interstate and Foreign Commerce, submitted by Mr. Mann, sets out:

"SUPREME COURT DECISION CONSTRUING SECTION
3 OF THE ACT OF FEBRUARY 20, 1907.

"Section 3 of the Act of February 20, 1907, has received the consideration of the Supreme Court in two cases.

"In the first case, that of the United States v. John Bitty (208 U. S. 393), the Supreme Court held that a foreign woman being brought to the United States as the personal, private mistress of a man living here was being imported 'for other immoral purposes,' and that, therefore, the importer was subject to the penalty of the statute and the woman to deportation.

"THIS DECISION IS NOT PERTINENT TO THE PHASE OF THE SUBJECT UNDER DISCUSSION, AND IS MENTIONED ONLY IN PASSING." (Congressional Record, Vol. 50, p. 3369.)

Furthermore, the Congressional history of the Act, as disclosed by the report of the House Committee on Interstate and Foreign Commerce, through Mr. Mann, the author of the "White-slave traffic Act," clearly discloses that the purpose and scope of the "White-slave traffic Act" was to affect cases of *com-*

mercialized vice only and not mere voluntary sexual intercourse unaccompanied with any mercenary object or gain. The report declares, among other things:

“POLICE POWERS OF THE STATES NOT INTERFERED
WITH.

It is not the purpose of the bill to interfere with or usurp in any way the police powers of the States. The bill reported does not endeavor to regulate, prohibit, or punish prostitution or the keeping of cases where prostitution is indulged in. The prohibition of prostitution and other immoral practices and the punishment of the practice of prostitution or the keeping of houses of ill fame, or other immoral places, in the several States, are matters wholly within the powers of the States and the Federal Government has no jurisdiction over those subjects. On the other hand, it has been shown in the investigation relating to the ‘White-slave traffic’ that persons engaged in that business in some of the large cities felt quite free to engage in the traffic as between the States, when they hesitated about engaging in the traffic wholly confined in one State.

PROVISIONS OF THE BILL.

Most of the provisions of the bill are based upon the power of Congress over interstate and foreign commerce.”

* * * * *

“The sections above proposed have been so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitu-

tion. The use of interstate commerce in sending prostitutes from one State to another in connection with this traffic in women would seem to be as directly connected with interstate commerce as the sending of tickets from one State to another in furtherance of the operation of a lottery. It is true that the act of prostitution is not committed in connection with the interstate transportation nor was the drawing in connection with the lottery a part of interstate commerce."

* * * * *

"THE WHITE SLAVE TRADE.

A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*" Congressional Record, Vol. 50, pp. 3368, 3370.)

In addition to all of the reasons advanced by us, in support of the contention we make that the "White-slave traffic Act" was intended by Congress to apply only to cases of commercialized vice, we insert an official expression of the views of the Department of

Justice of the United States, through its Attorney General, which has been called to our attention, as follows:

“DEPARTMENT OF JUSTICE

Office of United States Attorney
District of Minnesota.

St. Paul, July 17, 1912.

The Attorney General,
Washington, D. C.

Sir: I have the honor to submit for your direction and advice the facts in a case which is claimed to come within the purview of the Act of June 25, 1910, called the ‘White-Slave Traffic Act.’

One Ada Cox, twenty-four years of age, residing at Chicago, Ill., came to St. Paul in October, 1910, at the solicitation and expense of one Rufus Edwards. On her arrival here, Edwards met her at the station. They passed the day riding, lunching and drinking, and the night followed at a house of assignation in the city of Minneapolis. She remained there three days with Edwards and then returned to Chicago. In June, 1911, she repeated this visit under like circumstances.

June 12, 1912, Miss Cox applied to me for a warrant of arrest of Edwards under the above named act. At that time she made a statement of her connection with Edwards which was taken in shorthand by Mr. J. M. Dickey, Assistant United States Attorney, in this office, and by him written out.

A copy of this statement is enclosed.

Careful consideration of the facts and circumstances as related by Miss Cox fail to convince me that her case came within the spirit and intent of the Mann act. *The element of traffic is entirely absent from this transaction. It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of Ejusdem Generis. This view of the statute is the more reasonable when considered in connection with Section 8 where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain.*

Since I have hesitated about having a warrant issued for the arrest of Edwards, Miss Cox has enlisted certain club women in her behalf who are insisting on the arrest being made.

As this case is typical of many others that are liable to be brought to this office I deemed it proper to submit the facts to ascertain if my interpretation of the statute is in harmony with the departmental construction.

Very respectfully yours,

(Signed) Chas. C. Houpt,
United States Attorney."

"DEPARTMENT OF JUSTICE,
Washington, D. C.

July 23, 1912.

United States Attorney,
St. Paul, Minn.

I have received your letter of the 17th instant concerning a statement of the facts with

reference to the complaint of one Ada Cox, against one Rufus Edwards of an alleged violation of the White Slave Traffic Act.

I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the federal courts unless other and different facts are presented to you.

Respectfully,
(Signed) Geo. W. Wickersham,
Attorney General."

In addition to this expression of opinion, we respectfully refer to similar views in other instances expressed by the Hon. Attorney General and to be found in Congressional Record, Vol. 50, pp. 3354 et seq., especially page 3366.

It is a settled rule of statutory construction that where the language of a statute is ambiguous or otherwise doubtful, or, being plain, a literal construction could lead to such absurdity, hardship or injustice, as to render it irrational to impute to the law-making power a purpose to produce or permit such result, the contemporaneous construction given by an executive department of the Government is of value in endeavoring to ascertain the legislative intent.

Said the Supreme Court of the United States, in the case of U. S. v. Ala. R. R. Co., 142 U. S. 615-616, 612; 35 L. Ed. 1134 and 1136:

“We think the contemporaneous construction thus given by the executive department of the Government * * * a construction which, though inconsistent with the literalism of the Act, certainly comports with the equities of the case,—should be considered as decisive in this suit.”

Said the Supreme Court of the United States in the case of U. S. v. Finnell, 185 U. S. 236, 244; 46 L. Ed. 890, 893:

“Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. * * * But if there simply be doubt as to the soundness of that construction * * * the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons.”

In the case of New York v. New York City R. Co., 193 N. Y. 543, 86 N. E. 565, it was held that when the meaning is doubtful a practical construction by those for whom the law was enacted, or *by public officers whose duty it was to enforce it*, is entitled to *great influence*, but the ambiguity must not be captious, but

should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject.

See also, statement of the rule and cases collated in Vol. 36 CYC., pp. 1139, 1142.

Another error committed by the trial Court in interpreting the "White-slave traffic Act," was in giving to the words, "debauchery, or for any other immoral purpose," a much broader meaning than was the intent of Congress in enacting that law. The trial Judge construed these words as comprehending *any* act of sexual intercourse, even though it was voluntary and absolutely free from any element of commercialism or mercenary gain or profit.

We admit that whatever of doubt or ambiguity there is in the "White-slave traffic Act" arises from the words "debauchery, *or for any other immoral purpose.*" If given the broad and comprehensive meaning accorded to them by the trial Judge in the case at bar, we respectfully contend that they subvert the intent and purpose of the "White-slave traffic Act" and give the Act a much broader scope and operation than was intended by Congress. If given the less broad interpretation, for which we contend, these words are then given their

proper meaning, one which accords with the intent and purpose of Congress in passing the law.

We have seen, from other rules or canons of construction and interpretation, that it was, clearly, the intent of Congress that the highly penal provisions of the "White-slave traffic Act" should apply *only* to cases of *commercialized vice*. This view is further confirmed by taking into consideration the use of the words, "debauchery, or for any other *immoral purpose*." We submit that the trial Judge was not justified in treating those words as applicable to *any* act of voluntary sexual intercourse absolutely free from any element of commercialism or mercenary gain or profit, such as is disclosed by the facts in the case at bar. The "White-slave traffic Act" makes use of the words, "prostitution or debauchery, or for any other *immoral purpose*," and again in the same section, "to become a prostitute or to give herself up to debauchery, or to engage in any other *immoral practice*." It will be observed that the words "purpose" and "practice" are used interchangeably in the several sections, evidently having in mind various other and baser forms of immorality practiced for commercial gain by women and girls. A

perusal of the "White-slave traffic Act" discloses that in section 2 the words "purpose" and "practice" are used alternately and twice in that section. In section 3 they are used once alternately. In section 4 the word "practice" seems to be substituted for the word "purpose" in the expression "any other immoral purpose." In section 6 neither of the expressions "any other immoral purpose" or "any other immoral practice" seems to be used in the first paragraph of this section. A reference is simply made to "the transportation in foreign commerce of alien women and girls for purposes of *prostitution* and *debauchery*." In the second paragraph of section 6, however, will be found the expression, twice repeated, "any other immoral purpose."

Obviously, the word "practice," used generally throughout the Act interchangeably with the word "purpose," imports something more than a single act of sexual intercourse without a commercial design or purpose. "Practice," as defined by the lexicographers, signifies, *inter alia*, some act or function that we exercise or pursue as an occupation; as, to practice law. (Cent. Dic. Vol. 6, p. 4665.) The word should, therefore, be given this expressive meaning in order to correspond with

the evils sought to be eliminated by the passing of the law, and, thus construed, *the vindicatory* part of the law has application only to those who attempt to exercise or follow acts of immorality as a vocation.

“Prostitution,” of course, refers to commercialized vice. The words following it, “debauchery, or for any other immoral practice (purpose),” under the rule of construction known as “*ejusdem generis*,” where general words follow the enumeration of particular classes of persons or things, will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

CYC. Vol. 36, p. 1119, 1122, and case there collated.

This rule is especially applicable to statutes defining crimes and regulating their punishment.

State v. Erwin, 91 N. C. 545;

Lane v. State, 39 Ohio St. 312;

Ex. p. Muckenfuss, 52 Tex. Cr. 467, 107 S. W. 1131;

State v. Goodrich, 84 Wis. 359, 54 N. W. 577;

Reg. v. Reid, 30 Ont. 732.

Under this rule of construction, the words “or debauchery, or for any other immoral

purpose,” and again the words “or to give herself up to debauchery, or to engage in any other immoral *practice*,” undoubtedly should be construed as applicable only to “prostitution,” or, in other words, as applicable *only* to *commercialized vice*. The obtaining, furnishing, or bartering in young girls for the purpose of “*debauchery*,” by which we understand that expression to mean the pollution or ruining of young girls, is a species of traffic in young girls and women just as much as the obtaining, furnishing or bartering of more seasoned girls and women for the purposes of prostitution. The further expressions “other immoral *purpose*” and other immoral *practice*,” are undoubtedly used in the same connection and refer to immoral practices too revolting to discuss, to which young girls and women may be subjected, or which they may “practice” for profit or gain.

Likewise, “in accordance with the maxim ‘*nocitur a sociis*,’ the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears.”

See statement of this rule of construction in Vol. 36, of CYC, pp. 1118, 1119 and cases there collated.

It is a well known fact that there is a radical difference of opinion between federal Judges, expressed in the trial of cases brought under the "White-slave traffic Act" as to the proper scope and operation of that Act. Some federal Judges, as did the trial Judge in the case at bar, have held that any act of sexual immorality, even though free from any element of commercialism or profit or gain to the person furnishing the transportation, is within the intent and purpose of the Act; while others have held, in accord with the construction we maintain, that the scope and operation of the Act is limited to cases of commercialized vice only. Among the latter Judges, we beg to refer to District Judge Pollock, of Kansas, whose charge to the jury in a case brought under the "White-slave traffic Act" we incorporate in this Opening Brief, as a part of our argument. This charge is as follows:*

NOTE: This charge was reported by S. A. Buckland, an attorney at law at Wichita, Kansas, and was printed in pamphlet form by that gentleman after its revision by Judge Pollock, and we have inserted the entire charge from a printed copy.

*“In The
District Court of The United States
for the
District of Kansas
Second Division*

CHARGE TO JURY BY HON. JOHN C. POLLOCK IN
UNITED STATES VS. LEE BAKER
SEPTEMBER 23, 1913.

Gentlemen of the jury, you have now listened with care to the trial of this case up to this point when it becomes my duty under the law to charge you as to the law which shall govern you in your deliberations on a verdict in this case. You understand, gentlemen of the jury, in courts of justice where cases are tried before the court and a jury, the responsibility is evenly divided between the court and the jury. The duty of the court under our form of laws is to declare the law of the case, and it is the duty of the jury to take the law precisely as declared by the court, for, if there be any mistake made in a matter of law, it is the mistake of the court and the court is responsible for such mistake. On the other hand, it is the duty of the jury to determine the facts from the evidence, and if a mistake be made in that matter it is a mistake of the jury and not of the court. The jury must trust the court implicitly to correctly declare the law, and the court must trust the jury to correctly find the

facts in a given case from the evidence which is offered and received on a trial of the case before the jury; and if the jury unite the true facts of the case to the law as declared by the court in the verdict returned—whenever that is done, justice in our courts is properly administered; whenever it is not done for any reason, then justice is not properly administered.

Now then gentlemen of the jury I shall endeavor to state to you what it is that we are trying in this case today. In this case Lee Baker was presented to the Grand Jury and the Grand Jury returned an indictment against him in two counts under what is commonly known as the Mann act or White Slave Law that was some time since passed by our Congress. I shall read that law to you in a moment that you may become familiar with its terms. You understand, gentlemen of the jury, in a general way, in framing this Government of ours, the States that were then in existence for themselves, and for all other States that should be created thereafter, framed what we call a Federal Constitution, and that the Federal Constitution and the laws of Congress which are enacted in pursuance of our Constitution are the supreme law of this country. It is binding upon the States just as well as upon the individuals. In doing that, as I have said, the States that were then in existence, and each State that has come into existence since, has agreed the Constitution and the laws of Congress enacted in pursuance of that Constitution shall be the supreme law of this country. That is the reason that Congress takes control of certain matters which

are regulated by Federal law. The States were absolutely incompetent to regulate commerce between the different States, so they committed that matter to Congress, and the Congress of the United States under the Federal Constitution declares all laws and rules which relate to commerce between the several States, among the several States and with foreign countries. Now what is known as the "White Slave Law" was enacted by Congress under what is known as the commerce clause of the Constitution; that is, it relates entirely to commerce between the different States of this country. Now you know in a general way there are certain matters that the State alone has power to deal with and the Federal Government has no power to deal with. Our States regulate our laws as to marriage and divorce. Our States define in their statutes what is adultery, what is bigamy, what is fornication; all these are matters over which Congress has no control and no concern whatever. It is absolutely impossible in a government situated as is ours for the Federal Government to have anything to say as to how people shall be married, and who are properly married and divorced. It is just as impossible under our form of government for the United States to define the crime of adultery where committed within the borders of a State. It is for the States to punish for that matter, but it is within the power of Congress to regulate and control interstate commerce, that is, commerce from one State to another.

There are two counts in this indictment based on two distinct offenses which are prescribed by the law, and I will read the law and

refer to the indictment. (Reads Section). (2) Section 2 of the act on which is based the first count of this indictment reads as follows: (Reads Section 2.) As I have said to you, the first count of this indictment is based upon the section that I have read; that count reads as follows: present Lee Baker on or about the 28th day of June, 1912, in said District and within the jurisdiction of said Court at the City of Peabody, then and there being did unlawfully, knowingly and feloniously transport or cause to be transported from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri, one Cora Slover, then and there being a woman under the age of eighteen years for the purpose of prostitution or other immoral practices, the exact nature and character of said prostitution or other immoral practices being to the Grand Jury unknown, he the said Baker furnishing railroad transportation over the Chicago, Rock Island & Pacific Railway from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri.

Now, gentlemen, this act has not only been held constitutional by the Supreme Court of our country, but the Congress had the undoubted power to enact it for the purpose of regulating and keeping clean commerce between the States under the commerce clause of our national Constitution. The object and purpose of Congress in the passage of this act was to break up the practice of those engaged in procuring women or girls in one State of our country and transporting or assisting in transporting them into another State to then

become inmates of a house of prostitution, or to prostitute their persons in promiscuous sexual intercourse; in other words, to become or engage in the business of a prostitute; again, to prevent any one from transporting or assisting in transporting from one State into another State or Territory of our country any woman or girl under any guise, arrangement or device whatever for the purpose of there debauching or causing such woman or girl to be debauched by sexual intercourse, or other immoral practices which will cause her to live in a state of debauchery; or, to prevent any one from transporting, or assisting in transporting any woman or girl in such interstate commerce from one state to another for any such immoral purpose as will or may lead her into a life of prostitution or debauchery.

This is a criminal prosecution by indictment, hence, it devolves upon the government to make out the case charged in this indictment before you can convict, beyond a reasonable doubt. By that term, reasonable doubt, is meant exactly what it says; a reasonable doubt; such a doubt as will cause a thinking, prudent, reasonable man to hesitate before engaging in the graver or more important affairs of life. When any of the jury have in their minds an abiding conviction the defendant must be guilty as charged,—when they have reached that state of mind—they no longer have any reasonable doubt. The defendant in this case admits he did take this girl Cora Slover at about the time charged from Peabody to St. Joseph in the State of Missouri; that is to say, that he did travel in interstate commerce. He says he was going to

the city of St. Joe for the purpose of getting business in his occupation; that the girl went with him and that it was not his intention when he furnished this transportation, when he engaged in this interstate commerce with the girl that she should engage in prostitution or debauchery, but that they were engaged to be married and expected to be married. He travelled with her to St. Joseph and that they there lived together. *If what the defendant says in that relation is true he is not guilty under this law, because at the time this transportation was entered upon and carried out in this State he must have knowingly furnished this transportation to this girl knowing or intending that she should become a prostitute or should engage in debauchery or such other immoral sexual practice.* Now it is the contention of the Government, and this evidence was offered to show with what mind the defendant furnished this transportation, that this defendant did at St. Joseph, Missouri, request and endeavor to induce others to engage in sexual intercourse with this woman, who is now under this testimony, his wife. Now that was offered for the purpose of showing what his mind was at the time he furnished this transportation, the intent. If he was furnishing this transportation with the intent that she should enter a house of prostitution, or should help him in any way by selling her body, to help him along, then he is guilty under this law. *If, on the contrary, he was going to St. Joseph for the purpose of looking for a position where he could ply his business and that was his honest intent, and the girl wanted to go along, as she says she did, and it was not his intent that she*

should engage in prostitution, debauchery or immoral practices, then he is not guilty. The burden of proving this charge beyond a reasonable doubt is on the Government.

There is another section of this statute which I shall read and under the evidence in this case I find but little or any reason for submitting it. The third section reads: (Reading same.) That section of the statute is meant to cover cases when one entices another to travel in interstate commerce or does things inducing them for the purpose of having them engage themselves in prostitution or in such immoral practices or debauchery as will lead to sexual immorality and eventually to prostitution, but in this case, under the evidence, there is no evidence that he did induce her to go with him. *The evidence is that she was really the one who wanted to go with the defendant; so then as far as the second count of the indictment is concerned there is no evidence of inducing her to accompany him. She says she wanted to go and no one induced her to accompany him. She had no place to stay and wanted to go with him; so the question after all in this case is with what purpose did the defendant furnish this transportation to this girl Cora Slover at the time it was furnished, and what was his intention in that matter at the time that he engaged in this interstate commerce.* If he knowingly furnished her transportation and took this girl with him to St. Joseph for the purpose of prostitution on the part of the girl, or that she should there become through himself and others so debauched that she necessarily would become a prostitute, then the defendant is guilty and

you will so find; *believing the contrary, the Government has failed to convince you that is true as charged in this indictment, then you will find him not guilty.* Again, suppose these folks were engaged to be married; suppose he was going to St. Joseph with the legitimate purpose of engaging there in business; suppose this girl wanted to accompany him; if at the time they travelled from Peabody to St. Joseph and his motives were honest and his intentions toward the girl good; and if he did not intend that she should engage in prostitution or debauchery or other immoral acts after they got there; if that was the intention in his mind at the time he travelled; and after they got there they lived together as man and wife, that was a question for the State authorities of Missouri, and not for the Federal Government, because, as I have said, what constitutes adultery, what constitutes bigamy, and what constitutes living in a state of fornication, all those questions are matters for the State. So what did this man intend? That is the question for your determination. Now, gentlemen, I have said, you are the exclusive judges of the credibility of the witnesses, the weight of the evidence and the facts as proved. Take this case and consider it as far as the law is concerned as I have charged you.

There is another section that doubles the punishment in case the girl furnished the transportation, as in section two, or, is induced to go, as under section three, is under eighteen years. The evidence is, I believe, that the girl at the time this transportation was furnished was under eighteen, but the pun-

ishment is left, if you find the defendant guilty, with the discretion of the court between certain extremes.

You will now retire to your jury room and consider the case. I have caused four forms of verdict to be prepared; one relating to each of the two counts of the indictment, one finding the defendant guilty on the first count of the indictment, if you so find; one finding him not guilty on that count, if you so find; also, two forms of verdict relating to the second count in the same manner, and I send the indictment and these four forms of verdict with you."

Finally, in urging upon the Court the contention, made by us throughout the entire trial of the case in the Court below, that the "White-slave traffic Act," in its intent, scope and operation, was intended by Congress to apply to cases *only* of *commercialized vice*, we remind this Court that the "White-slave traffic Act" is a highly penal statute and that it should be strictly construed, and that, if there be any doubt and ambiguity in some of the verbiage of the Act, that doubt or ambiguity should be resolved against the Government and in favor of the individual. As was well said in the case of *Hackfeld v. U. S.*, 197 U. S. 442:

"This is a highly penal statute and we think the well known rule as laid down by Chief Justice Marshall in *U. Sfl v. Wiltberger*, 5 Wheat., 76, 95: 'The rule that penal statutes are to be strictly construed is perhaps not much

less old than construction itself. It is founded on the tenderness of the law for the rights of the individual.' ”

In concluding our argument on this phase of the case, we respectfully submit that the facts proved by the prosecution, assuming them to be true, do not bring the defendant within the scope and operation of the “White-slave traffic Act” and that a reversal must follow and the defendant be discharged and permitted to go hence without day.

CONCLUSION.

We feel confident that this Court will be compelled, on account of the errors that we have pointed out, to grant the defendant a new trial. It must be evident that if the rulings of the lower court and its instructions are to be approved by an appellate tribunal, the rights guaranteed to a citizen by the laws and Constitution will be whittled down until they are almost completely nullified.

But while a new trial, at least, is, in our humble judgment, imperative, we believe that the Court should also say that a proper construction of the "White-slave traffic Act" does not embrace such a class of cases as this. Let us repeat, that there is no element of coercion or force or persuasion; there is no element of gain; there is no element of business activity; there is no element of "interstate commerce;" there is no intention to violate any law of the United States. At the very worst, two persons of opposite sexes are guilty of immorality. But if so, they were guilty

before they crossed the State line and the interstate feature *is* a false quantity. If this law is applicable to this case, it then applies to any case where a man and woman, who are not married, cross a State line. Such was not the intention of the Act and, if such was the intention, we claim that it would be beyond the constitutional power of Congress to enact. Congress should have, and does have, no power to reach cases of private immorality where no element of traffic exists.

It has become too often the case, in our days, that, when a case excites popular interest and, particularly, when the public mind is influenced, the public should demand, not a fair and impartial trial, not a calm, dispassionate consideration of the law and the evidence, but should demand a victim—a sacrifice—a conviction, although to secure it every right guaranteed to a defendant on trial should be trampled down. If a person charged with crime is to be tried at all in times of great popular excitement, calling for revenge, we should be all the more careful to guard the defendant's rights, and it has been the glory of the Federal courts that justice and law have been administered unaffected by popular fury, which

is always evanescent and, in a moment, will repent of its violence and frequently go to the opposite extreme.

We respectfully ask that the judgment should be reversed.

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APPENDIX.

ACT OF JUNE 25, 1910 (36 Stat., 825).

An Act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such

woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or co-

erced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of

Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 5. That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections.

SEC. 6. That for the purpose of regulating and preventing the transportation in foreign

commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white-slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to exercise supervision over such alien women and girls, receive their declarations, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner General of Immigration to receive and keep on file in his

office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this Act to the persons, respectively, making and filing them.

Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white-slave traffic, shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procurement to come to this country within the knowledge of such person, and any person who shall fail within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose

of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white- slave traffic, to file such statement concerning such alien woman or girl with the Commissioner General of Immigration, or who shall knowingly and willfully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning her procuration to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No per-

son shall be excused from furnishing the statement, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement, as required by the provisions of this section.

SEC. 7. That the term "Territory," as used in this Act, shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone. The word "person," as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any other person or by any corporation, company, society, or association within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or

failure of such other person, or of such company, corporation, society, or association, as well as that of the person himself.

SEC. 8. That this Act shall be known and referred to as the "White-slave traffic Act."

Approved, June 25, 1910.

No. 2404

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MAURY I. DIGGS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF THEO. J. ROCHE, SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL OF THE
UNITED STATES.

THEO. J. ROCHE,
*Special Assistant to the
Attorney General.*

JEREMIAH F. SULLIVAN,
Of Counsel.

Filed this.....day of November, 1914.

Filed

FRANK D. MONCKTON, Clerk

DEC 1 - 1914

By.....Deputy Clerk.

F. D. Monckton,

Clerk.

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No. 2404

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MAURY I. DIGGS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF THEO. J. ROCHE, SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL OF THE
UNITED STATES.

I.

General Statement of the Case Showing Main Facts Relied
Upon by Government to Sustain Conviction.

PARTIES INVOLVED IN RUIN AND DOWNFALL OF MARSHA
WARRINGTON AND LOLA NORRIS.

In the latter part of September, 1912, Miss Marsha Warrington was standing on the sidewalk of a Sacramento street with a lady friend, Miss Bowers, waiting for a street car. While there Mr. Monte Austin, of the firm of Austin & O'Brien, keepers of a saloon in the Diepenbrock Building, came along in company with Maury I. Diggs. Aus-

tin had know Miss Warrington before. He was, as the record discloses, a friend of the Diggs family, and welcome to the Diggs household. The relations of Austin with the Diggs family are shown in an account given by Diggs himself on the stand, of a dinner and dancing party held in December, 1912, or January, 1913. He said:

(333) "We had a dinner party at Mr. Hamilton's place in the top flat of the same building. There are six flats. Mine was on the ground floor and his was on the top floor. The two houses were not large enough to have as many people as we wanted to have there and dance, which they wanted to do; so we agreed to have the dinner up in Mr. Hamilton's place. Mr. Hamilton and his wife, my sister-in-law, my wife and myself, Miss Warrington and Mr. Austin were all present. *I invited Mr. Austin and he said he would bring Miss Warrington.* * * * *I arranged the party and had her come. My wife called her up on the telephone and invited her. I called for Mr. Austin at the saloon and went with him to Miss Warrington's house and got her and then took her to my house.* * * * So after the dinner broke up we went down to my apartment and pushed back the furniture and Miss Warrington and my wife took turns in playing the piano and we all ragged. Mr. Austin sang. He was quite a singer; he sang until about half past eleven. *Mr. Austin had to leave and that broke up the party.* He had to go back to the saloon. I got the machine and took Miss Warrington and Mr. Austin home. Mr. Austin got out at Eighth and 'K' and I took Miss Warrington on home. I believe it was in January."

This Monte Austin with whom Diggs was on terms of such intimacy, on the evening when Miss

Warrington and her friend, Miss Bowers, were standing waiting for the car, introduced Diggs to Marsha Warrington. Miss Warrington had never known Diggs before. At the time of the meeting Marsha Warrington was not quite twenty years of age, having been born November 11, 1892 (Rec. 242-3). She had resided in Sacramento ever since her birth (Rec. 230). Her own mother had died when she was but five years old, and her father having married again, she lived with her father and stepmother and the other members of her father's family (Rec. 230). For a year prior to this meeting, late in September, she had been employed as a stenographer in the office of her father (Rec. 243), the agent at Sacramento of the Santa Fe Railway Company (Rec. 234). Diggs was some years older than Marsha, having been born on May 21, 1886. He was an architect by profession, in good business standing and doing quite a business in his line in Sacramento, and had as offices three rooms in the Diepenbrock Building, located not far from the saloon of Austin & O'Brien, likewise located in Diepenbrock's property. He had at one time been State Architect (Rec. 320). He was married, his wife being a trifle younger than he. At the time of the trial in August, 1913, she testified that she was just twenty-five years of age (Rec. 366). Of the Diggs marriage there was one young child,—a daughter.

Among the young friends of Marsha Warrington there was one with whom she was especially inti-

mate,—Lola Norris. Lola lived about eight blocks away from the Warrington home with her parents, whose only child she was (Rec. 230). Lola was slightly younger than Marsha, having been born August 3, 1893 (Rec. 261). For about a year prior to the so-called Reno trip she was employed in the State Library in the Capitol at Sacramento. Diggs had a friend with whom he was especially intimate, a boon companion in the person of F. Drew Caminetti, of about his own age, who was employed as a clerk in the office of the State Board of Control in Sacramento. He also was married and lived with his wife and two young children. At the trial of the Diggs case, in August, Caminetti's wife gave the ages of her children as follows: One six months old and the other two years old (Rec. 361). At the time of the Reno trip, March 10, 1913, the younger child must have been but a few weeks old. Diggs, in his testimony, says that Caminetti, on January 31, 1913, stated that his wife was just about to go to a hospital. In all probability the child was born in the hospital about the time of the San Francisco trip in the middle of February, 1913 (Rec. 321).

**DIGGS DETERMINED FROM THE START TO MAKE A CONQUEST
OF THE YOUNG GIRL, MARSHA WARRINGTON.**

Diggs apparently must have been much impressed by Miss Warrington at his first casual meeting, when his friend Austin introduced him to her. He determined to meet her again and become intimately acquainted with her.

Diggs, in his cross-examination, thus refers to his meeting with Marsha Warrington:

(346) "I first met Marsha Warrington, I think it was in September, 1912, at the corner of Tenth and 'K' Streets. About two weeks after that I met her again. I believe Mr. Austin told me that she was living with her father and stepmother about three or four days after I met her the second time. * * * I suppose I figured she was living at home and must have been living with her parents. I first met Miss Norris October 7 or 8 or somewhere along there I believe. Miss Warrington introduced her to me. *It was an arrangement that Miss Warrington and Mr. Caminetti had made to have me take them riding.*"

CAMINETTI WAS THE INSTRUMENT OF DIGGS IN ARRANGING THE PRELIMINARIES THROUGH WHICH THE PARTY OF FOUR WAS CONSTITUTED.

This second meeting, the arrangement of which was ascribed by Diggs to Miss Warrington and Mr. Caminetti, was absolutely arranged at the instigation of Diggs himself. At page 261, Lola Norris testifies with reference to this matter as follows:

"I was twenty years of age on the 3rd of August; I live with my parents at 1012 'P' Street, and I know Miss Marsha Warrington; have known her several years intimately, and know her parents—stepmother and father, and she is acquainted with my parents and I have known Maury I. Diggs. I have known Mr. Diggs since the last part of October, 1912; I was employed at the State Capitol in the State Library; I also know F. Drew Caminetti, have known him a little over a year. * * * Up to the latter part of October, 1912, I had barely a speaking acquaintance with Mr. Caminetti.

During the latter part of October I met both Diggs and Caminetti together. Miss Warrington was with me when I met them. *Mr. Caminetti called me up on the telephone and asked me if I would introduce him to Miss Warrington so he could make her acquainted with Mr. Diggs; that Mr. Diggs was desirous of meeting her. I told Mr. Caminetti I thought he was acquainted with her and he said he thought not; that Mr. Diggs had told him that he did not know Miss Warrington, and so I agreed to do that. I had never seen Mr. Diggs before, and do not remember who introduced him to me, whether it was Miss Warrington or Mr. Caminetti."*

**THIS FIRST AUTOMOBILE RIDE WAS THE BEGINNING OF A
FAST AND FURIOUS RACE ON THE DOWNWARD GRADE
FOR THE FOUR MEMBERS OF THE "JOY-RIDING" PARTY.**

The meeting on this first ride in Diggs' automobile, driven by himself, was fraught with disastrous consequences not only to Marsha Warrington, but to the whole party, including Lola Norris, who on that evening for the first time went out with Caminetti, and who never before had known Diggs.

G. A. Putnam, sporting editor of the Sacramento Bee, who had known Marsha Warrington for four years, saw the parties as they met at the automobile, and at once became solicitous for the future of his friend. He thus refers to the matter (Rec. 313-14). Speaking of Marsha Warrington, he said:

"The first I saw her in company with Diggs was on the first night she went out with him, I believe, because I saw him introduced to her upon that evening and I was solicitous for her reputation."

This solicitude of Putnam for his young lady friend was well warranted. That night was the beginning of the rapid downfall of Marsha Warrington and that of her young friend, Lola Norris.

MARSHA WARRINGTON'S STORY OF HER DOWNFALL.

At page 244 Marsha Warrington refers to some of the events occurring in November or December following her introduction to Diggs.

“Previous to the two weeks before my departure” (the Reno trip) “I went up to the office of Mr. Diggs but not very often. Mr. Caminetti and Miss Norris were with me. I remember going there in the month of December and having some champagne. Mr. Diggs got it and I remember sexual relations with Mr. Diggs upon that occasion.” (Later on witness fixes the disgraceful episode in Diggs’ office in the month of November.) “Sexual intercourse took place between Mr. Diggs and I more than once at his office.”

(245) “I remember going to Jackson with Mr. Diggs and Miss Norris in an automobile on election night in November, 1912, for the purpose of getting Mr. Caminetti. We came right back the same night and got home a little after twelve o’clock, I think. We all had something to drink. Mr. Diggs and Mr. Caminetti procured the drinks. I do not know what it was we drank. It was a mixture. I never received anything of value from Mr. Diggs but a vanity box.

(246) “I remember that one night upon my return from San Francisco I went to Folsom with Mr. Diggs, Joe O’Brien, to whom I have referred, and Miss Norris. I remember having dinner at Folsom. I had some intoxicating liquor at that time but I do not remem-

ber what it was. * * * The first sexual intercourse I ever had with Mr. Diggs was in his office in November, 1912."

TEMPEST IN A TEAPOT: ALLEGED MISCONDUCT OF GOVERNMENT COUNSEL IN ASKING DIGGS IF CERTAIN QUESTIONS ASKED BY HIS COUNSEL WERE NOT PROMPTED BY HIM.

The matters above narrated by Marsha Warrington were brought out on Marsha Warrington's cross-examination by defendant's counsel. In this connection it may be well to refer to a question asked by defendant's counsel, reference to which by counsel for the government has been made the subject of frequent and rather severe attack as misconduct on the part of government counsel as well as severe criticism of the trial judge.

In their discussion of the evidence counsel for plaintiff in error claim that the representatives of the government were not justified in claiming that Diggs himself prompted questions on a certain line which tended to bring out clearly the intimate and disgraceful relations that existed between Diggs himself, and his victim, Marsha Warrington. One of the questions which afford ground for this comment by government counsel is the following, shown at page 246:

"Q. I will ask you if during the month of January, between the 12th and 15th, probably on the 12th of January, 1913, if you did not go to the house of Mr. Diggs on 14th Street, between I and J, while Mr. Diggs' wife was in Woodland? You and Lola Norris, Mr. Caminetti and Mr. Diggs, and if you did not

sit down on a couch in the dining room, and if you did not have some conversation there and if you did not thereafter say: 'This is no place for us' to Mr. Diggs and go from the dining room into another room, a bedroom, and lock the door?"

If that question was not prompted by Maury I. Diggs, it must have originated without provocation in the wonderfully fertile brain of some one of his counsel. No other person on earth than the reluctant witness then on the stand, outside of Diggs himself, knew of the circumstances referred to in the question of his counsel. The prompting by a party in interest of questions to his counsel is a matter which has come under the observation of every lawyer or judge who has participated in more than one trial in any court of justice. The prompting is discernible alike by the ear and by the eye. But whether observed by the eye or the ear of any juror, no sane man could suspect for a moment that the question above quoted from the record, had its origin in any other source than the prompting of the defendant, Maury I. Diggs, made to his counsel either immediately at the time of the question or in advance thereof. In fact, in his own examination, he directly admits such to be the fact. At page 352 the following language of Diggs is shown:

"It was the latter part of December or the first part of January, somewhere along there. I don't remember the exact date, that Miss Warrington, Miss Lola Norris, Mr. Caminetti and I were in my residence during the (353)

absence of my wife. My wife was in Woodland at that time for two or three days. I informed Miss Warrington, Miss Norris and Caminetti of that fact when they wanted to visit my house. All four of us went to my house about 8 o'clock in the evening. I left my machine at 'H' Street between 13th and 14th, about half a block from my residence. I went home in advance of the other party and told them they would have to come around the back way through the rear entrance if they wanted to go in. They went around to the back door and I opened the door. They knocked when they came and I let them in. They had to pass the front door of the house and they went through the rear by an alley way. The house is located on the corner of an alley way. I did not see them when they passed in front of the house, as I was in the house already. After they all came in we sat down together and enjoyed ourselves. Mr. Caminetti went to the kitchen and dug up the drinks out of the pantry and served the remainder of a pint bottle of cocktails, about three drinks I think. They were dealt out to the two girls and myself by Caminetti. I should judge we were in the house that night for a half or three quarters of an hour, three quarters of an hour probably. Miss Warrington took me into the bed room, the door was locked; *that was the bed room occupied jointly by myself and wife.*

(354) Q. And did you and Miss Warrington there have sexual intercourse?

A. I would rather not speak of the relation.

Q. Please answer the question.

A. I would rather not speak of my relation with Miss Warrington.

Q. *Don't you remember during the cross-examination of Miss Warrington suggesting to your counsel and in the presence of the jury that they ask Miss Warrington if on that occasion she and you did not go into your bed*

room and if she did not lock the bed room door? Do you remember suggesting that question to your counsel in the presence of the jury during the cross-examination of Miss Warrington?

A. She locked the door.

Q. *Didn't you suggest that question to your counsel?*

A. *Well, I suggested that to my counsel a long time before I came into the courtroom.*

WITNESS (continuing). *That suggestion may have been made by me during the cross-examination of Miss Warrington. I don't remember. I won't say that I didn't make the suggestion.*

Q. Did you not on the occasion mentioned, at the time the four of you went to your home, have sexual intercourse with Miss Warrington on the very bed that you and your wife occupy at home?

A. If you insist upon the question I will answer it, Mr. Sullivan.

Q. Answer it.

A. Miss Warrington and I went to the bedroom and——

Q. Answer it yes or no.

The COURT. Answer it yes or no and you can explain afterwards if you wish to.

A. Yes."

At page 355 appears the question which seems to have excited the ire of defendant and his counsel.

"MR. SULLIVAN. Q. Mr. Diggs, during the course of this trial and in the presence of the jury here, during the cross-examination of Miss Warrington, did you not repeatedly suggest to your counsel questions to be propounded to Miss Warrington asking her if she did not at divers times have intercourse with you?

In the course of the argument justifying the asking of that question, one of the counsel for the government said:

“The witness upon the stand at this time expresses or apparently expresses a reluctance to testify to an act of intercourse between himself and Miss Warrington. If it be true that on the cross-examination of this young girl in the presence of the jury, and in an audible tone of voice he did put to his counsel questions and to have put these questions to her for the purpose of eliciting from her lips the fact that he did have on numerous occasions intercourse, that fact should go to the jury for the purpose of enabling them to determine whether in declining a moment ago to answer whether he had intercourse on his wife’s bed with this young girl he was acting in good faith.”

* * * * *

MR. DEVLIN. Inasmuch as they have commented on the conduct of the defendant and attacked his motive I ask the privilege at this time of allowing him to explain his reasons.

THE COURT. You can have him explain that later on. * * *

Following the suggestion that the explanation might be made later and the request of Mr. Devlin to be permitted to make further reply to Mr. Roche’s suggestions, the trial judge said:

(356) “*The jury all understand that the argument of counsel arising on an objection is not evidence in the case and is not to be considered by the jury in determining the issue to be submitted to them.*”

* * * * *

THE COURT. We will instruct the jury at the proper time for instructing them.”

**DIGGS' EXPLANATION: HIS OWN STORY OF HIS CROWNING
ACT OF INFAMY.**

The explanation promised by his counsel and given by Diggs is shown during the redirect examination by Mr. Devlin.

(359) "The trip to my home upon the occasion when the four of us were present occurred before the dinner and dancing party (the dinner and dancing party occurred in December or January).

Q. As Mr. Sullivan asked you about it, state what occurred on that occasion."

Objection to the question having been made the court overruled the objection so as to permit the witness to make the explanation desired to be made upon cross-examination.

"MR. DEVLIN. You were going to explain an answer. I will give you a chance to explain it.

* * * * *

A. We were sitting on a couch in the dining-room, Miss Warrington, Miss Norris and I,—and Caminetti went out in the kitchen and got this bottle of cocktails, there were hardly three full glasses; the girls did not drink any, I believe—I believe Marsha drank a part of a glass, a very small bit of it, and I believe I drank a glass and so did Mr. Caminetti. I got up from the couch and went over and sat down in a chair. Miss Norris and Mr. Caminetti lay down on the couch in the dining room. Miss (360) Warrington said to me 'This is no place for us.' She said 'Isn't there a place around here where we can lie down?' *'I said, 'Certainly' and we went in the bedroom and the door was locked. I don't exactly remember whether I locked the door, whether Miss Warrington locked the door or whether she told me to lock*

it. Anyhow, she went over and lay down on the bed, and I went over and lay down with her and the inevitable happened. of course. During the progress of this Miss Warrington said to me, 'What would your wife do if she could see us now?' I said 'It is pretty hard to tell what my wife would do to you and to me too.' In a short while she says, 'Well, Mrs. Diggs has got nothing on me', laughed about it and got up and said 'I beat her to it in her own bedroom', and got up and walked out to the dining-room."

This story was intended by Diggs to smirch the partner of his illicit pleasure. Does it not by his own oath-bound utterance, exemplify his own degradation and degeneracy?

**MARSHA WARRINGTON'S STORY OF HER ILLICIT RELATIONS
WITH MAURY I. DIGGS, CONTINUED.**

Following the disgraceful episode in Diggs' house in his wife's bedroom, Marsha Warrington continued her story of the immoralities of the party of four.

At page 247 she said:

"The act of sexual intercourse did not very frequently pass between Mr. Diggs and me prior to my going to Reno. I remember going on an automobile trip with Mr. Diggs and Mr. Caminetti on the upper Stockton Road about a week before the Reno trip."

**THE TRIP TO SAN FRANCISCO AND SAN JOSE IN FEBRUARY,
1913.**

At page 243 she says:

"I remember going to San Francisco with Mr. Diggs and Mr. Caminetti and Miss Norris

and going to the Grand Hotel in that city, during the month of February, 1913, and staying there all night with Mr. Diggs in that month. Mr. Caminetti and Miss Norris stayed there on the same occasion. Mr. Diggs registered there, I think he told me, under a fictitious name, as man and wife. I occupied the same room with Mr. Diggs separately, and Mr. Caminetti and Miss Norris occupied another room together, in the same hotel. I slept alone with Mr. Diggs that night and Miss Norris slept alone with Mr. Caminetti that night."

This trip was about the time of the birth of Caminetti's younger child and the confinement of his wife in the hospital in Sacramento (321).

At page 247 Marsha Warrington fixes the date of the automobile ride on the upper Stockton road as being about a week before the Reno trip. In that connection the witness said further:

"About a month before that automobile trip on the upper Stockton road I apprised Mr. Diggs that I was with child."

At page 253 Marsha Warrington testified to the circumstances of her being an invited guest at the dinner and dance party of the Diggs and Hamilton families by invitation of Mr. and Mrs. Diggs. It appears from the testimony of Diggs himself that this dinner and dance party occurred subsequently to the occasion when Diggs in his own house had defiled his marriage bed.

Miss Warrington testifies:

"I took dinner at the home of Mr. and Mrs. Diggs as stated in my direct examination, in

1912. I do not remember the date. I have nothing by which I can fix the time. Mr. and Mrs. Diggs invited me there to dinner. It was an oral invitation over the telephone. I suppose she telephoned from home. She was home when I went to dinner."

At page 257 Miss Warrington was questioned as follows:

"Q. You were asked by counsel upon the other side of this case whether you recalled distinctly an event which took place in Mr. Diggs' office in the month of November, 1912, during the course of which some champagne was given you by the defendant. You remember the occurrence, do you?

A. Yes. *The occurrence is vividly impressed upon my mind because it was the first time I had had sexual intercourse with any one.*

(258) Prior to that act of intercourse, which you say was the first time you had ever had intercourse in your life, had you been supplied with any intoxicating liquor, and if so, what?

A. Champagne.

Mr. ROCHE. I am referring now, of course, Miss Warrington, to while you were there in the office on that occasion and prior to this act of intercourse.

Q. At the time you say you had that intercourse and which you say was the first time you had had intercourse in your life, in what condition were you as a result of that champagne?

A. *I was rather intoxicated.*

(259) *At the time I went to Reno I was pregnant by Mr. Diggs and informed Mr. Diggs of that condition about a month before. We always went to one road house. * * * Upon these occasions Mr. Diggs and Mr. Caminetti ordered the drinks and one of them would pay for them. Upon one occasion at a road house*

between Stockton and Sacramento I refused to drink some liquor ordered by Mr. Diggs and he knocked the glass out of my hand. * * * We took the trip to San Jose because Mr. Diggs asked us to go and said that he had to go down on business and wished very much to have us accompany him, and he said we would possibly have to register as man and wife, but that Miss Norris and I would occupy the same room and that he and Mr. Caminetti would have the other. We reached San Francisco between 11 and 12 at night. Mr. Diggs took me in one room and locked the door. Immediately afterwards Miss Norris tried to get in. I don't remember how long she tried to get in. I was only at the Columbia Hotel once. I went there with Miss Norris and remained there half an hour. That was the only time I had ever been in the hotel and the only time I saw the defendant there. At that time he said something about hiding from the police *because of some juvenile offense. He said it was something connected with his stenographer.* Upon one of the occasions that I was at his office I found a letter, and upon calling Mr. Diggs' attention to it, he said it was from his stenographer."

LOLA NORRIS TELLS THE STORY OF HER SHAME.

Lola Norris was less than twenty years old when Diggs and Caminetti started out on their nefarious joint enterprise of adultery and conquest, and of ruin of the two girls, Marsha Warrington and Lola Norris, who stood just at the threshold of womanhood. The story of Lola Norris, of her personal and joint experience, does not disclose as precipitate a downfall on her part as on that of her friend, but it shows her as ultimately reaching the same lower level, without the possible concomitant of

maternity of a bastard child, begotten by the boon companion of Maury I. Diggs. Of her experience between that first ride in October, 1912, and her train ride on her way home from the Reno bungalow of debauchery, she furnishes an account which we condense as follows:

(261) "I live in Sacramento. I have lived there all my life. I was twenty years of age upon the 3rd of August (1913). I live with my parents at 1012 'P' Street. I know Miss Marsha Warrington; have known her several years intimately and know her parents, stepmother and father. * * * Between the date of this first event in the latter part of October, 1912, and the time the four of us left for Reno we met three or four times a week. I remember hearing Mr. Diggs talking about the relations which existed between himself and his wife. He said he was not very happy with his wife; he made that statement a number of times. Mr. Caminetti also told me he was not living happily with his wife; he told me several times that he and his wife had about agreed to separate, but never told me anything more definitely than that. * * * Mr. Maury I. Diggs told me over the telephone on one occasion that he and his wife had positively agreed to separate and that his wife was going to apply for a divorce within a few days. This was some time before the trip to Reno. Mr. Diggs spoke a number of times in the presence of Miss Warrington about not being happy with his wife.

(262) We visited one road house in Sacramento; just one. There was dancing going on there at the time and I danced. I remember also stopping at another place over in Stockton called the 'Heidelberg'. * * * On our rides in the machine we would sometimes stop in front of taverns or road houses and have

drinks brought out to us but not often. Either Mr. Diggs or Mr. Caminetti would order the drinks. I don't know how many times I visited Mr. Diggs' office in Sacramento during those two months at night,—possibly six or seven times. I remember stopping at the Columbia Hotel one night. I visited the hotel with Miss Warrington once about a week before our trip to Reno and stayed there about three quarters of an hour. Mr. Diggs and Mr. Caminetti were there. I noticed manifestations of affection between Mr. Diggs and Miss Warrington between the latter part of October, 1912, up to the time we left for Reno. He told her he loved her. *He said he would get along much better with Miss Warrington than with his wife. Mr. Caminetti also manifested his affection towards me in the presence of Diggs. He told me that he loved me a number of times. He frequently put his arms around me and caressed me* (271). I remember going to Folsom with Miss Warrington, Mr. Diggs and Mr. Caminetti; we just rode up there and came right back. * * * I also recall a visit to Jackson made with Mr. Diggs and Miss Warrington in Mr. Diggs' machine. I also recall the trips made to San Francisco and San Jose from Sacramento."

TRIP OF THE PARTY OF FOUR TO SAN FRANCISCO AND SAN JOSE IN FEBRUARY, 1913.

Speaking of the trip to the Grand Hotel in San Francisco and the over-night stay in the hotel at San Jose, Lola Norris testified:

(271) "When we first talked about coming down here to San Francisco it was the idea that we should start early in the morning—Sunday morning—and come back that night. Then it was suggested why not start Saturday afternoon, because it would hurry the trip so to go

and come back on the same day. So we talked about it, and I said I didn't like to do that because I didn't like to remain away all night, because Miss Warrington and I did not have any friends with whom we could stay down here. Then Mr. Diggs and Caminetti told us that that did not make any difference, that they would get us a room to stay any place we wanted, and that all we had to do was to name the place we wanted to stay and they would get us a room (272), and if we wanted them to they would go some place else. We did not decide to go right then. I told Miss Warrington the next day I didn't think they would do that, and she told them what I said, and they resented the fact and became highly indignant that I did not think they would treat us right. Finally we were convinced that they meant what they said, and we went. When we got here to San Francisco, it was rather late, and we went to a hotel. * * * The clerk showed Mr. Diggs and Miss Warrington to one room and Mr. Caminetti and me to an adjoining one. They registered before that. We went into the room, Mr. Caminetti and I, I expecting that as soon as the clerk left Miss Warrington and I would take one room and Mr. Diggs and Mr. Caminetti the other. I waited until the clerk got out, so as not to cause him to be suspicious, and as soon as the clerk left I started toward the door of the room which Mr. Diggs and Miss Warrington occupied. And just before I reached it I heard the key turn in the lock so I went to the door and tried it and it was locked. This was the door connecting the two rooms. I knocked at the door and I called but nobody answered. I must have called off and on for an hour. I continued knocking and called 'Marsha' for a long time but nobody answered. Then I went around to the other door and that also was locked. I went to both doors and nobody answered me at all. Then

I came back in the room. I knocked for such a long time that Mr. Caminetti told me that if I didn't stop making such a noise they would come and put us all out, so I stopped finally and I went back to the room with Mr. Caminetti and stayed there all night but did not sleep. I don't think I took off any of my clothing, that I remember, that night. The next morning we had breakfast and then we rode around a while, Mr. Diggs had to get a new tire for his machine and we expected to get home that night which was Sunday night; we spent almost the whole afternoon looking for a place where we could buy a tire. Finally he got one and we started towards San Jose. This was about four o'clock. * * * Then Mr. Diggs told us and Miss Warrington, too, that she did not think we would have time to get home that night, they said it was too late then to start out for home in the hope of getting home before very late, and so they said the only thing left to do was to stay in San Jose that night."

Poor Marsha Warrington at that time had long since passed her November experience in Diggs' office and their illicit relationship had evidently been fully established.

Miss Norris continues:

(273) "When we arrived in San Jose we had dinner first and then went to a hotel and stayed all that night. I occupied a room with Mr. Caminetti and Miss Warrington another room with Mr. Diggs."

According to the story of Miss Norris, Caminetti only consummated his foul purpose of possessing himself thoroughly of the body of Miss Norris dur-

ing the sojourn in the Reno bungalow. Before reaching Reno she had, during the greater part of the night, occupied the same berth with Caminetti in the drawing room of the Pullman car on which they traveled. Speaking of the first day in Reno, at page 274, Miss Norris testified as follows:

“Mr. Diggs and Mr. Caminetti went over to the clerk’s desk in the office of the hotel and reserved three rooms, a suite of rooms. And we were shown up to our rooms. Mr. Diggs told us that *he had registered as Mr. Enright and wife, and Mr. Caminetti registered as Mr. Ross*. The rooms were adjoining. We stopped at that hotel one night. There were three rooms, two bedrooms and a sitting room. *Mr. Caminetti and I occupied one and Mr. Diggs and Miss Warrington the other. I discarded most of my wearing apparel that night.*”

After the first night spent in the Riverside Hotel, the bungalow was secured for the party. Speaking of the bungalow, Miss Norris said:

(275) “Ultimately all four of us reached the bungalow and remained there three nights during which time we were supplied with provisions. Mr. Diggs did most of the ordering. Miss Warrington and I left the cottage once and took a walk about two blocks. Mr. Diggs and Mr. Caminetti told us not to leave the cottage under any condition. *Mr. Diggs and Miss Warrington occupied the front bed room and Mr. Caminetti and I the back bed room. Mr. Caminetti and I had sexual intercourse in that bungalow. He said he would marry me, and I believed him.*

(277) *I never had sexual intercourse with Mr. Caminetti prior to the sexual relations I had with him in the bungalow. I swear posi-*

tively to that. I never had sexual relations with any man in my whole life outside of Mr. Caminetti and Mr. Caminetti knows that. He admitted that to me himself many times."

Speaking on the subject of intoxicants, Miss Norris testified at page 287:

"I never had much experience in drinking intoxicating liquor before I met Mr. Diggs and Mr. Caminetti."

This story as told by Lola Norris of her rapid transformation between the latter part of October, 1912, and the middle of March, 1913, abundantly justifies the findings of the jury that Maury I. Diggs was responsible for her transportation in interstate commerce between Sacramento, California, and Reno, Nevada. Her story is uncontradicted. It shows that the intimate relationship developed between F. Drew Caminetti and this young girl not yet twenty years of age, was of the direct procurement of Diggs himself. It was through Caminetti that Diggs effected the combination of four which resulted in the breaking up of two families and the absolute disgracing of four several homes.

PRIOR TO THE RENO TRIP FULLY TWO WEEKS HAD BEEN SPENT BY DIGGS AND CAMINETTI IN THEIR EFFORTS TO INDUCE THE WOMEN TO BECOME PARTNERS WITH THEM IN THE FLIGHT.

Two weeks were spent in argument, inducement and threatening before the two girls were finally

prevailed on to make the Reno trip in company with Diggs and Caminetti.

At page 321 Diggs himself testified as follows:

“I saw Marsha Warrington about two weeks and one day before March 9th, on a levee at Sacramento and had a conversation with her; Marsha and I had an engagement to go out that evening in the machine and we went riding.”

The conversation referred to the intimacy between himself and Marsha and the desirability of his getting out of town. In that conversation Diggs claims that he told Marsha that it was best for both of them to discontinue their relations. He said:

(322) I guess we were talking for half an hour there, then we went home. I took Marsha home and she got out within about a block of her house and walked home alone, and upon leaving me she said I guess I won't see you any more for two weeks and I said no. * * * The next morning I called her on the telephone. She was very much surprised to know that I was still in town. * * * I think we met the next day, and had lunch together at the Peerless restaurant. I called her up a couple of times between the time on the levee and the time Mr. Diepenbrock spoke to me in O'Brien's saloon at Sacramento. It was a week before we left Sacramento.”

From the Sunday preceding their departure on the midnight train until Wednesday in the middle of that week, Diggs was in hiding at a room in the Columbia Hotel in Sacramento (Rec. 327).

SUGGESTIONS OF DIVORCE AND REMARRIAGE.

In the various conversations among the four parties to the illicit relationship, the subject of divorce by Diggs and Caminetti from their wives and subsequent remarriage to the Warrington and Norris girls was frequently the topic of discussion.

With reference to this subject Marsha Warrington testified at pages 230-231, as follows:

“Q. Just state what Mr. Diggs said to you concerning the relations which then existed and had existed between himself and his wife?

A. He said they were unpleasant relations.

WITNESS (continuing). He said they did not get along together at all and that he was unhappy with her, and he wanted to leave town. I had an affection for Mr. Diggs at that time. Before we took the trip he spoke to me several times concerning his relations with his wife, and said he had affection for me. He referred to this subject very often and said he cared more for me than he did for his wife and I believed he did. And he manifested it by kissing me. Marriage was also discussed between us during the two weeks prior to the trip. He said he would get a divorce from his wife and marry me.

(235) During ‘that two hours’ conversation he stated that Mr. Caminetti was going along with Miss Norris. *He also said he would get a divorce from his wife, and that Mr. Caminetti would get a divorce from his wife and marry Miss Norris.*”

The same subject was referred to by this witness again at page 240:

“While at the bungalow Mr. Diggs promised to get a divorce from his wife and marry me,

and Mr. Caminetti said he would do the same and marry Miss Norris."

Referring to the same subject Lola Norris testified at pages 261-2, as follows:

"Between the date of this first event of the latter part of October, 1912, and the time the four of us left for Reno, we met three or four times a week, and I remember hearing Mr. Diggs talking about the relations which existed between himself and his wife. He said he was not very happy with his wife; he made that statement a number of times. Mr. Caminetti also told me he was not living happily with his wife; he told me several times that he and his wife had about agreed to separate. * * * Mr. Maury I. Diggs told me over the telephone on one occasion that he and his wife had positively agreed to separate and that his wife was going to apply for a divorce within a few days. This was some time before the trip to Reno. Mr. Diggs spoke a number of times in the presence of Miss Warrington about not being happy with his wife?"

No denial of the statements of these two witnesses is found anywhere in the record.

ARGUMENTS ADVANCED TO INDUCE THE GIRLS TO ACCOMPANY DIGGS AND CAMINETTI ON THEIR TRIP.

From the time of the first conversation between Diggs and Marsha Warrington on the levee at Sacramento until the time of their departure, two weeks later, the matter of flight was a frequent subject of discussion between Diggs and Caminetti and the two girls. These conversations occurred

some in the Peerless restaurant, some in the Saddle Rock restaurant and some at the room temporarily occupied by Diggs while in hiding at the Columbia Hotel.

Speaking of the Columbia Hotel meeting, Diggs himself testified at page 335:

“During the last week ending March 9th, Miss Warrington and Miss Norris met me at the Columbia Hotel, they came up and seen me about 4 o’clock in the afternoon. I think that either Mr. Caminetti told them or I told them that I was there. I believe that I called Miss Warrington up. Miss Warrington came up there. It was in regard to our conditions. The specific arrangement was for all to come up there, whether it was on my suggestion or on Mr. Caminetti’s, I have forgotten which. I told her that I thoroughly and positively made up my mind to leave town.”

At page 233 Marsha Warrington testified:

“In these conversations, including this one, he said he would get a divorce from his wife and marry me. I conversed with him from 2 o’clock to 5:30. He told me about all the things that would happen if I did not go with him. Mr. Caminetti and Miss Norris were also there.”

THE ELEMENTS OF COERCION IN THESE ARGUMENTS MADE TO INDUCE THE GIRLS TO CONSENT TO BECOME PARTNERS IN FLIGHT—THREATENED PUBLICATION IN THE SACRAMENTO BEE NEWSPAPER AND ARREST ON WARRANTS OF THE JUVENILE COURT.

In referring to the prolonged conversation held between Diggs and the two girls on the afternoon of

the Sunday on which they prepared for their departure Marsha Warrington says:

“We were to meet at 29th and J Streets. Before meeting Mr. Diggs on that occasion Miss Norris and I *had come to the conclusion we would not go. And we both met Mr. Diggs and told him we had changed our minds about going—that we would not go.*”

These declarations were made by the two girls to Diggs on the Sunday afternoon, a few hours before their flight, though they had on the preceding day, Saturday, at the Peerless restaurant, as a result of the protracted argument there made, already concluded to go.

Continuing with reference to the Sunday afternoon conversation at the park the witness said further:

(234) “This was at the corner of 29th and J Streets, Sunday afternoon. We then went to the park located near that place, and conversed for about two hours about the trip. We said we would not go and he said we had to go. We discussed it pro and con for two hours. He said that his lawyer had told him—he reviewed those things that he had said before, and that *the next day before the afternoon was over they would have warrants at our house and arrest us, and that their wives would prosecute us to the fullest extent of the law, and that we would be sent to the Reform School and that everybody in town would know about it, and that we had to go, that was all there was to it, that there was no need to argue at all.*”

At page 232 the witness Marsha Warrington, speaking of the Reno trip, said:

“That trip was discussed every time we met during those two weeks. In addition to those matters to which I have already testified, upon these occasions when the four of us would be together, Mr. Diggs said everybody in Sacramento knew all about it, and *they were going to publish it in one of the papers, and that we would be sent to the reform school, that they had our names at the Juvenile Court, and there would be warrants out for our arrest the next day if we did not go* or rather, did not go away, and we would be put through the third degree—by the Juvenile people I suppose or by the policeman. Mr. Caminetti did not say very much he just seemed to agree with him. Miss Norris and I said we could not go.”

The same witness speaking at page 235 with reference to a discussion of the matter in the Saddle Rock restaurant shortly before train-time said:

“Went back to the Saddle Rock and met Diggs and Caminetti who were waiting for us in a box on the main floor of the dining room. This was about nine o'clock Sunday night. While we were there we were discussing where to go. Mr. Diggs said he did not know whether to go to Salt Lake, Reno or Los Angeles. They finally made up their mind to go to Reno; this was suggested by *Mr. Diggs, and they said that we would have to go now and could not back out*. There was some attempt on our part to do so. We said for them to go on but we would just as soon stay and take chances, with all that was coming out the next day. *They said no it was too late, we could not back out then.*”

Lola Norris, at pages 264-5, testifies on the same subject. After Caminetti had announced that they had concluded the best thing to do was for all four to go away, she said:

"I said I would not think of going. (265) When I left Mr. Diggs he said 'Well, goodbye, you might not see me again, I might be gone to-morrow morning'; and Mr. Caminetti said that in all probability he would go too. That was on Monday night." (Less than a week before the departure.) *"I said I absolutely would not go.* There was quite a lot of talk about Miss Warrington and myself going to the Reform School if we stayed, both Mr. Diggs and Mr. Caminetti made that suggestion. I saw Mr. Caminetti almost every night that week.

* * * * *

*"The topic discussed was about leaving home. Mr. Diggs generally took the initiative. They told us that the police had found out that we had been going out with them, that our names were on the record in the police court, and that in a few days warrants were going to be issued for our arrest and we would be summoned to appear before the Juvenile Court. They told us, they said, 'our wives know about it and would probably sue us for alienating their husband's affections,' and that also in all probability they would start actions for divorce naming Miss Warrington and me as correspondents and this, they told us, was punishable by a term in prison. * * * Mr. Diggs told us that his attorney had told him to take his advice and get out of town as quick as he could and take the girls with him. He often told us that Mr. Harris was his attorney. He told us every day that he was paying his lawyer a large sum of money to keep the affair out of (266) the newspapers, but we always*

said we could not go. The first time we agreed to go was on the Saturday before the Sunday we left, this was at the Peerless restaurant, where we were possibly two hours and a half that afternoon discussing the trip, going away."

Referring to the matter of the Juvenile Court, the same witness Norris testified at pages 244-245, as follows:

"I also remember meeting Mr. Diggs in a hotel in Sacramento during the last week of my stay in Sacramento. I went there at his request. This was at the Columbia Hotel where Mr. Diggs was hiding in fear of being arrested. He said some policemen were after him for some fictitious check or something that he had passed."

As a matter of fact Diggs himself testified at page 350 that he was served with a warrant on the Wednesday following the Monday on which the meeting had been held in the Columbia Hotel. That warrant was in connection with his issuing a check when he had no funds in the bank to pay the same. Following arrest on the warrant Diggs had made a trip to San Francisco the day following his leaving the Columbia Hotel and spent Thursday and Friday of that week in San Francisco with his wife.

His wife on page 365 speaks of this San Francisco trip as follows:

"I remember when my husband was away for two or three days in hiding. After he came out of hiding I accompanied him on a trip to San Francisco. We came down on Thursday

and went home on Friday. I went home with him."

The witness, Lola Norris, in speaking further on the subject of the arguments made to induce her and Marsha to make the trip, and in referring especially to the argument on the subject held in the Peerless restaurant on Saturday, testifies:

(266) "*They told us that as soon as we were served with warrants the newspapers would have a big account of it.* When we first started to discuss the subject I said I could not go, and then after we talked about it for such a long time we were finally convinced, Miss Warrington and I, that it was the only thing left for us to do, that we would have to go if we wanted to avoid a scandal. I told them I did not know how my mother would stand the shock and they said they thought she would get over it all right. Mr. Diggs said, 'It takes bullets to kill, and other people have got over things worse than that', and both Mr. Caminetti and Mr. Diggs said, 'if you think that is going to kill your parents, how do you think they will feel if you stayed home here and a big lot of notoriety and scandal comes out here, and you are in the scandal, don't you suppose they would rather have you away than have you stay here. * * * That was the first time Marsha Warrington and I agreed to go away.'"

Referring to the discussion of the matter on Sunday afternoon in the park, Lola Norris testified further:

(267) "After leaving Mr. Diggs and Mr. Caminetti the preceding afternoon" (when the girls had first given their consent to go) "and

meeting them on Sunday afternoon I had changed my mind about going. *Miss Warrington and I had decided the night before that we were willing to stay home and take the consequences;* and we talked it over while we were going to meet Mr. Diggs; and when we finally did meet him, we told him that we had considered it and we thought if any disgrace were likely to arise we were willing to stay home and bear it; but if they thought it was so necessary for Mr. Caminetti and Mr. Diggs to go and leave us at home *we were willing to bear any of the disgrace.* Mr. Diggs said that was absolutely foolish to talk like that, that if I were as familiar with the actual condition of affairs as he was I would not hesitate for a minute and that I would have been out of town over a week ago. He said that we were all absolutely ruined in Sacramento. * * * He said everybody would scorn us, that our former friends would not have anything to do with us, that everybody would point us out as the two girls who were connected with that Diggs affair, so he said we should go with them, and they were to get divorces and marry us. And after a two hours' conversation with Mr. Diggs we finally agreed to go, and made an appointment to meet them at the Saddle Rock restaurant in Sacramento."

Even after this extremely reluctant consent, at the subsequent meeting in the Saddle Rock restaurant the same evening, the following happened as Miss Norris testified:

(268) "We then got on a car and rode down to the Saddle Rock restaurant, and met Mr. Diggs and Mr. Caminetti there, and remained there about two hours and a quarter, I guess. * * * Mr. Caminetti remained there about half an hour. We asked them again if they

thought it was absolutely the only way that we could avoid any notoriety and *they told us not to ask the question any more, that we had asked it enough already, that it was childish to talk about it and that they had told us enough about it.*"

Then again at the station Lola Norris wished to avoid taking the trip. At page 269 she testifies:

"I left the restaurant with Mr. Diggs and Miss Warrington; we went to the depot; we got there just about ten minutes before the train left. (10:30 P. M.)

Mr. Caminetti had not returned, then Mr. Diggs told Miss Warrington and me that we had better go with him and let Mr. Caminetti come on later. *I then said I thought I would go home and he said not to act so foolish that I had started out and that I had better come on with him as I had started in the first place.*"

(270) "I asked Mr. Diggs why he did not go alone and he said 'Why he wouldn't think of it—he thought too much of Miss Warrington and me to leave us in such a state.' * * * He went to telephone and said he found Mr. Caminetti, and said that he said that he would be at the Saddle Rock restaurant in time for the next train, to meet us there in time for the next train and leave for Reno, that train left somewhere around twelve o'clock, I think. Then the three of us went to the Saddle Rock restaurant and left just before the train left for Reno. Mr. Caminetti came just in time to get the train, then the four of us went to the depot and *Mr. Diggs bought the tickets.*"

THERE WAS NO TRUTH IN THE STORY THAT COMPLAINTS HAD BEEN MADE TO THE JUVENILE COURT OR THAT WARRANTS WERE ISSUED OR WERE ABOUT TO BE ISSUED FOR THE ARREST OF THE WARRINGTON AND NORRIS GIRLS.

Notwithstanding the persistency with which the argument was urged upon the Warrington and Norris girls that complaints had been made in the Juvenile Court involving them as defendants on criminal charges and that warrants for their arrest had been or were about to be issued, the fact is that no such complaints had been made nor had any such warrants issued, nor were they about to be served.

M. J. Sullivan, the probation officer connected with the Juvenile Court was called as a witness. He testified:

(291) "I was probation officer during the months of February and March, 1913. I am connected with the Juvenile Court as probation officer. * * * During the month of February and March, 1913, I was familiar with very nearly all complaints made in the Juvenile Court concerning minors or concerning any other subject.

Q. *Prior to the 10th day of March, 1913, had any complaint of any kind to your knowledge been made to the Juvenile Court or to any of the officials of the Juvenile Court of Sacramento County concerning Marsha Warrington or Lola Norris?* * * *

(292) A. *No, sir.* * * *

The policy of the Juvenile Court is to keep as much secrecy as possible in order to avoid publicity. I refused at any time to give any news to the press. *I never heard Lola Norris or Marsha Warrington's name mentioned from*

Judge Hughes, or from any other source until the articles were published in the newspapers."

The publications in the newspapers, referred to by the witness, were not made until after the arrest of the parties and the return from Reno. As a matter of fact, no complaint had been lodged with the officials of the Juvenile Court nor any warrant issued for the girls, Lola Norris and Marsha Warrington, or for either of them, prior to the Reno escapade. Yet the lodging of complaint with the officials of the Juvenile Court, or the actual or impending issuance of warrants for the arrest of the two girls were arguments most strongly urged upon them to coerce them into flight.

THERE WAS NO FOUNDATION FOR THE THREAT THAT THE SACRAMENTO BEE WAS ABOUT TO PUBLISH THE FACTS WITH REFERENCE TO THE RELATIONSHIP OF DIGGS AND MARSHA WARRINGTON AND CAMINETTI AND LOLA NORRIS.

Just as persistently as the threat of Juvenile Court proceedings and arrest was urged upon them was the suggestion made to these frightened girls that the Sacramento Bee was about to publish the facts in connection with their illicit connection with the defendant and his associate. To set this matter at rest counsel for the government during the trial, called the managing editor of the Bee, John S. Chambers. Chambers testified:

(288) "I am the managing editor of the Sacramento Bee. * * * As such man-

aging editor I occupied or kept myself fully informed as to articles which were being published from time to time in the columns of the Sacramento Bee. I keep in touch with the various editors of the different departments and with the reporters themselves, and frequently have proofs sent to me before they appear in the paper. Before an article is published concerning, we will say, the reputation of any of the people residing in or about Sacramento, it is first submitted to me.

* * * *Prior to the 10th day of March, 1913, to my knowledge, there had not been any articles prepared or written for publication in the 'Sacramento Bee' in which the names of those two girls or either of them was referred to. The 'Sacramento Bee' had not, to my knowledge, any intention, prior to the 10th day of March, 1913, of publishing any article relating to or involving Miss Marsha Warrington or Miss Lola Norris or any escapade in which it was claimed either one of these two young ladies was involved."*

G. A. Putnam, the sporting editor of the Bee, was called as a witness for the defendant. In his examination by Mr. Devlin, he said:

(312) "I reside in Sacramento and am the sporting editor of the 'Sacramento Bee', I mean I am the editor of the sporting column. I know Marsha Warrington. I have known her for about four years, and also know Lola Norris."

The witness testified as to having advised Marsha Warrington to discontinue her relations with Diggs. He said:

"I told her what I had told her before, to lay off with this fellow. She said that she

certainly would. I saw her on Saturday, the day previous to the day she left for Reno; she rung up the office and wanted to see me. *She said that Lola Norris had come to her and said that she had heard that the 'Sacramento Bee' was about to publish a story and she asked me if that was true,*

(313) *and I said no, that the 'Sacramento Bee's' policy was to hold out all such things as that, and they never run names and that anyway, that nobody had a story on that subject at all and they didn't know they were going together. This was Saturday before they went to Reno, at noon. She rang up the telephone girl and gave her her number. I told her there was not any story in the 'Bee' and that no newspaper would ever run a story about girls going with fellows. * * * She said Miss Norris was worried, she was afraid the matter was to be given publicity in the 'Sacramento Bee'—she might have said other papers, I don't know; I told her that was foolish. * * * I told her she was going out again with Diggs and she said she went out only three or four times lately with him anyhow. I told her she had better cut it out, and I said he was not any good, and he had a bad reputation, and if she didn't she certainly would be seen with him and it would ruin her character there in town, and also her reputation and hurt her father and her family."*

On cross-examination by Mr. Sullivan, referring to his conversation with Marsha Warrington, he said:

"The conversation took place on a Saturday afternoon, the Saturday before she left. * * * I asked her again if she had gone out with him since the last time I saw her. She said yes; I told her in that conversation to stop it

because *Digg's reputation was bad. The Bee positively never intended to publish any article concerning the escapade or the conduct of Miss Warrington, Miss Norris or the defendant or Caminetti* for I was the only one in the office —no one knew in the 'Sacramento Bee' office at all about this thing, it was a surprise to everyone."

THE CONSENT OF THE GIRLS TO BECOME ASSOCIATES WITH DIGGS AND CAMINETTI IN THEIR FLIGHT WAS NOT VOLUNTARY.

As we have seen in preceding pages, Diggs started in with his arguments on Marsha Warrington to bring about her association and that of Lola Norris with him in his flight, in a conversation held with her on the levee in Sacramento two weeks before the flight. From that time on until the evening of their departure the matter had been in like manner thoroughly impressed upon Lola Norris. Both girls as we have shown in the preceding pages repeatedly and persistently declined to accompany their lewd associates in their flight.

As Marsha Warrington said at page 253:

"I went willingly after I had been scared into it."

The first time the girls consented to join in the flight was at the Peerless restaurant on the afternoon of Saturday, the day before their departure. There the same arguments which had been used by Diggs and Caminetti during the preceding two weeks were again and again impressed upon these

two young girls. They were threatened with prosecutions by their wives for alienation of affections, possibly resulting in imprisonment; threatened with warrants from the Juvenile Court involving their immediate arrest, when as a matter of fact no complaints against them or either of them had been urged upon that court, nor any warrants issued or proposed. They were threatened with publication in the "Sacramento Bee" when as a matter of fact it was neither the purpose nor the policy of the "Sacramento Bee" to make any such publication, and when, as a matter of fact, the only one connected with the "Sacramento Bee" who knew of the affair, was a friend of the two girls and had given assurance that no such publication was to be made. And yet, in the face of the consent, coerced—absolutely wrong by fabricated fear from the girls, while a condition of desperation really brought on by Diggs and his associate, Diggs' counsel urge upon this court, with seeming seriousness, the claim that both Lola Norris and Marsha Warrington were accomplices of Maury I. Diggs and F. Drew Caminetti in their violation of the White Slave Traffic Act. To us the contention seems absurd, but apparently counsel for Diggs seem obsessed by the idea that these two twenty-year old girls were actually accomplices of their associates when those two criminal associates deliberately committed the offenses denounced by the White Slave Traffic Act. These two elegant and distinguished gentlemen, in their own judgment so

immeasurably superior to the miserable mortals who engage in the vile white slave traffic, would actually have this court believe that these two young girls were their accomplices in a deliberate violation of the "White Slave Traffic Act".

INCIDENTS OF THE TRIP TO RENO.

Following the afternoon conference between the two girls and Diggs at the park, the first meeting at the Saddle Rock restaurant was held, which lasted until well along in the evening. Even at that meeting the girls again tried to recall the consent which had been extorted from them on the Saturday afternoon preceding, and again forced from them by Diggs in the park meeting earlier on that Sunday afternoon.

Poor little Lola Norris up to almost the very moment before the leaving time of the midnight train, tried to break away from the consent which had been wrung from her. To the very last the girls, notwithstanding their first consent, manifested a disposition to face the disgrace and stay with their families.

At page 236 Miss Warrington testified:

"After Mr. Diggs, Miss Norris and myself reached the depot, the train came in and I told Mr. Diggs to go on and take the train, and that *I was perfectly willing to stay in Sacramento and would not go with him.* He said no, that he wanted me to go."

Caminetti not having been in time for the earlier train, Diggs reached him by telephone and arranged

a further meeting of the party with Caminetti at the Saddle Rock restaurant.

Speaking of this Miss Warrington testified:

(236) "When Mr. Caminetti reached there he said he had some money and that we would go on the next train. We then left the Saddle Rock and went to the depot, reaching it about 12 o'clock. *Mr. Diggs said for us to wait and he would get the tickets; we waited and he got the tickets at the ticket office in the depot.* I waited with Mr. Caminetti and Miss Norris, then the train came and we got on. It was an ordinary Pullman car, and *Mr. Diggs got a drawing-room from the Pullman conductor and he paid for it.* We waited until it was made up, then the four of us entered. Mr. Diggs, I think, ordered the porter to make up the drawing room. There were three beds—the upper and lower berths and a little side bed. *We all went to bed right after we entered the room. Miss Norris and Mr. Caminetti had the upper berth and Mr. Diggs and I had the lower berth.* Miss Norris got in the upper berth two or three minutes after we entered the room. I think she got her clothes off up there, her shoes, her skirt, and her waist and her hat. Mr. Caminetti got in the berth the same time she did. I think he took his clothing off up there. I got in the lower berth first. Before getting into it I took off my skirt and waist and pumps. Mr. Diggs took off his shoes and coat and I think he took off his trousers and his outer shirt. * * * I saw Mr. Diggs give the tickets to the conductor."

Lola Norris' story of the incidents of the trip is shown at page 270, lines 13 to 30, and page 271, lines 1 to 12. In the main it agrees in detail with

the story as given by her friend, Marsha Warrington. In concluding it she says:

“We reached Reno about eight or nine o'clock next morning.”

At page 273 the same witness says:

“I recall when the train reached Truckee. We arose about an hour and a half before the train reached Reno. *Upon our arising in the morning Mr. Diggs said that they would get a cottage when we got into Reno. All four of us were to live in the cottage.*”

Referring to the time of reaching Reno Miss Warrington said:

(238) “I remained in the berth with the defendant Diggs until about eight o'clock the next morning, I think. Mr. Diggs got out first. Mr. Caminetti, I think, got out of the upper berth first. I recall reaching Reno that morning. It was before noon, I think, the first place we went was to a cafe to have our lunch. * * * Then Mr. Diggs and Mr. Caminetti went to the real estate firm, I think.”

**DIGGS, BY CAMINETTI'S CONSENT, WAS “BOSS” OR MANAGER
OF THE MOVEMENTS OF THE PARTY ON THE TRIP.**

In all things from the initial meeting in October, 1912, down to the discovery of the party of voyagers in the Reno bungalow on March 14, 1913, Diggs and Caminetti acted together in the pursuit of their common purpose,—the debauchment of these two young women.

It was especially arranged, just on the eve of their departure, that Diggs should be “boss” or

manager of the movements of the party. At page 287 the following is shown in the testimony of Lola Norris:

“At the Saddle Rock restaurant just before leaving Mr. Caminetti gave me some money and told me to buy my own ticket to Reno. Mr. Diggs saw him give it to me, and *he said that he would buy all the tickets*, that it would never do for us to separate, and for Miss Warrington and I to go together and they go together, away from us. And he said—we had been talking about places to go, and they had suggested several places, and Mr. Diggs said it would not do for every one to have suggestions, that each one of course thought his was the best, and that *someone would have to manage the affair, somebody would have to be the boss, ‘now who will it be’*; and Mr. Caminetti said *‘Well, I name you to be the person to manage the trip’, and so he considered himself the boss.*”

SUITE AT RIVERSIDE HOTEL.

The departure from Sacramento had been made shortly after midnight of March 9-10, 1913. After lunching at a cafe the parties went to the Riverside Hotel in Reno. The girls had been directed to proceed first to the hotel while the men secured a cottage or bungalow in which they might live.

Marsha Warrington says:

(239) “They said we should go to the hotel and wait for them and they would try and rent a house for one month at least. I think they said they were going to stay in Nevada about six months. * * * They told us that when we reached the Riverside Hotel we should wait there until they returned. They returned

about 5 o'clock. Then they registered, after which we went upstairs to the suite of three rooms, two bed-rooms with a sitting room between. We occupied these rooms just one night and left about 9:30, I think, next morning. *Mr. Caminetti and Miss Norris had one and Mr. Diggs and I had the other room.* We retired about 10:00 o'clock. *We all discarded our wearing apparel. Mr. Diggs occupied the bed with me and Miss Norris occupied the other bed with Mr. Caminetti."*

Speaking about registering Lola Norris said at page 274:

"Mr. Diggs and Mr. Caminetti went over to the clerk's desk in the office of the hotel and reserved three rooms, a suite of rooms. Mr. Diggs told us that he *registered as Mr. Enright and wife, and Mr. Caminetti registered as Mr. Ross.* * * * There were three rooms, two bedrooms and a sitting-room. *Mr. Caminetti and I occupied one and Mr. Diggs and Miss Warrington the other. I discarded most of my wearing apparel that night."*

AFTER THE FIRST NIGHT SPENT AT THE RIVERSIDE HOTEL THE PARTIES DURING THEIR STAY IN RENO ON TUESDAY, WEDNESDAY AND THURSDAY NIGHTS OCCUPIED ROOMS IN A BUNGALOW RENTED BY DIGGS, COMPORTING THEMSELVES AS HUSBANDS AND WIVES.

As we have seen above, while in Reno, Diggs went by the name of Enright, designating Marsha Warrington as his wife, and Caminetti went under the name of Ross, Lola Norris being also recognized as his wife.

During Monday the two men had arranged to rent during their stay in Reno, a cottage or bung-

alow. The negotiations were conducted with a man by the name of Mergen, employed by the firm of Peek, Sample & Co., real estate agents.

Mergen testified at page 200:

"I recall negotiating with Mr. Enright on the 10th of March, 1913, for the renting of that cottage. * * * The name Enright was given me by himself. I would recognize the man again if I saw him in this courtroom.

Q. Will you kindly look around and see if he is here?

A. He is right there, with his hand up to his face.

Mr. ROCHE. You will concede, gentlemen, that that is the defendant.

Mr. DEVLIN. Yes."

At page 284, speaking of the names by which the parties were known at Reno, Lola Norris testified:

"I knew that Mr. Caminetti went by the name of Ross at Reno and that I was going by the name of Mrs. Ross, and that Mr. Diggs and Miss Warrington were going by the name of Enright and wife."

During the several days of their stay in the seclusion of the Reno bungalow the parties comported themselves according to the names they bore respectively, as husbands and wives. Marsha Warrington said at page 240:

"While at Reno I had sexual relations with Mr. Diggs."

At page 275 Lola Norris testified:

"Mr. Diggs and Miss Warrington occupied the front bedroom and Mr. Caminetti and I the

back bedroom. Mr. Caminetti and I had sexual intercourse in that bungalow. He said he would marry me and I believed him."

In her testimony given on the preceding pages of the brief, Lola Norris testified: that the first time that Caminetti ever succeeded in his purpose of having sexual intercourse with her, was in the bungalow in Reno, Nevada. It was only there, at the end of their hurried trip from Sacramento, in interstate commerce, that Caminetti finally and fully accomplished his purpose in the ruin of Lola Norris. Yet counsel for plaintiff in error Diggs exhibit what is intended to appear as a most righteous feeling of indignation because claim is made that any seduction was accomplished as a result of what they are pleased to term the "Reno escapade". It is perfectly obvious, as found by the jury, that Diggs fully intended to continue while in Nevada his relationship with Marsha Warrington on the same lines that he had established during the disgraceful debauch in his offices in Sacramento. It is likewise manifest that it was his purpose to continue the organization of the party of four until his comrade and confederate in crime, Caminetti, had finally accomplished the purpose that he had set out as early as October 7th or 8th of the preceding year, to accomplish. It is perfectly obvious, as found by the jury, that the purpose of both Diggs and Caminetti was that the two girls should cohabit as concubine and mistress with the two men and that that relationship should be maintained in what they regarded as the seclusion or privacy of the Reno bung-

alow. Certainly, while staying in Reno they comported themselves in all particulars as men and women cohabiting as husbands and wives. As Mrs. Enright and Mrs. Ross, Marsha Warrington and Lola Norris were as designated in the indictment, and as characterized in the charge of the court, mistresses and concubines to Maury I. Diggs and F. Drew Caminetti.

**DISCOVERY AND BREAKING UP OF THE PARTY OF FUGITIVES
ON FRIDAY, MARCH 14, 1913.**

The several parties were not allowed to rest very long undetected in the supposed seclusion of their Reno bungalow. On the 14th of March, in pursuance to instructions from the Sacramento Chief of Police, Chief Hillhouse of the City of Reno, accompanied by police officer Nichols and constable Reed, and Martin Besley of Sacramento, a friend of the Warrington and Norris families, made an early morning raid on the Reno bungalow, arousing the fugitive party from their beds. By direction of the Sacramento officials, Diggs and Caminetti and the two girls were taken into custody and a little later started on their way to their home city of Sacramento.

Speaking of the coming of the officers, Marsha Warrington testified at page 240:

“I remember the morning when Chief Hillhouse came to the house. I was just going to get out of bed. Mr. Diggs was still in bed, it was about 8:30 in the morning, I think, I remember Mr. Diggs going to the rear door when the officers came. Mr. Diggs said to me it was

up to us whether he went to the penitentiary or not. He also said that if we were questioned by the officers, to shield them in whatever we said, and to tell them that Miss Norris and I had occupied the front room together and that Mr. Diggs and Caminetti had occupied the back room.

On the train returning to Sacramento the Assistant District Attorney of Sacramento County questioned the girls and their companions with reference to the facts connected with their flight and their stay in Reno. Subsequently the matter was investigated by the United States Grand Jury and indictments were found against both Caminetti and Diggs under the White Slave Traffic Act. The indictment against Diggs is shown at pages two to eight of the record. It was filed on May 6, 1913. The first count charges that the defendant did willfully, knowingly and feloniously, unlawfully transport and cause to be transported, and did aid and assist in obtaining transportation for and in transporting in interstate commerce from Sacramento * * * to Reno, in the State of Nevada, over the lines of railroad of the Southern Pacific Company a certain girl, to wit, one Marsha Warrington, *for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and mistress of the said defendant.*

The second count is in substantially the same language, the transportation, however, being of the girl, Lola Norris, and the party whose concubine

and mistress she was to be, being F. Drew Caminetti.

The third count charges that the defendant did willfully, unlawfully, and feloniously, knowingly procure and obtain and cause to be procured and obtained, and aid and assist in procuring and obtaining, a ticket issued by the Southern Pacific Company at its office in the city of Sacramento * * * for passage between the city of Sacramento * * * and Reno in the State of Nevada, to be used by a certain girl, to wit, one Marsha Warrington.

It is further charged in that count that the intent and purpose on the part of the defendant was that Marsha Warrington should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and mistress of the said defendant.

The fourth count is similar in character to the third count, referring to the procurement or aid in the procurement of the ticket, the transportation being with the intent and for the purpose that Lola Norris should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and mistress of one F. Drew Caminetti.

The fifth count charges that Diggs willfully, unlawfully, feloniously and knowingly persuaded, induced and enticed, and caused to be persuaded, in-

duced and enticed the girl Marsha Warrington to be transported to Reno, Nevada, for the same purpose as declared in the first and third counts referring to Diggs and Marsha Warrington.

The sixth count was also for inducing, enticing and persuading, the victim of the inducement, being Lola Norris, and the purpose of the transportation being the same as alleged in the second and fourth counts of the indictment referring to Lola Norris and F. Drew Caminetti.

The case was tried before Hon. W. C. Van Fleet, United States District Judge, during the month of August, 1913, and after argument was submitted to the jury and the verdict was returned on August 20, 1913. The verdict of the jury was in this language:

(396) "We, the jury, find Maury I. Diggs, the defendant at the bar, guilty on the first, second, third and fourth counts of the indictment, and no verdict on the fifth and sixth counts of the indictment."

The fifth and sixth counts in the indictment are those referring to inducement, enticement and persuasion.

On the 17th day of September, 1913, judgment was entered against defendant in accordance with the verdict of the jury, and he was sentenced to be imprisoned for two years in the United States Penitentiary at McNeil's Island in the State of Washington, and ordered to pay a fine in the sum of \$2000.

The penalty imposed under the judgment of conviction on the four counts did not exceed the penalty which might be imposed under a conviction on any one.

Section 2 of the statute provides that a person convicted shall be punished by a fine not exceeding \$5000, or by imprisonment not exceeding five years or by both such fine and imprisonment, in the discretion of the court.

Section 3, providing for a penalty for inducing, persuading and enticing, makes the penalty identical with that prescribed by Section 2.

II.

Under the Common Law Practice Which Prevails in Federal Courts, a Trial Judge Has a Right, and it is His Duty, in Charging the Jury to Express His Personal Opinions as to the Facts and Proper Inferences Therefrom, in Order to Aid the Jurors in the Intelligent Discharge of Their Duties as Triers of Fact.

One reason why in many American courts and especially in important criminal cases, there frequently occurs a miscarriage or defeat of justice, is that the trial judge in many of the state courts, by statutory or constitutional prohibition, is precluded from indicating or expressing his personal views as to the facts disclosed by the evidence before the jury. The trial judge as a rule is trained through his studies and by his practical experience in the

trial of cases, civil or criminal, so that he is better equipped than the average untrained juror in sifting and weighing the evidence submitted before him and before the jurors for final determination by the jury.

Under the common law rule of the federal courts it is one of the recognized functions of the trial judge to express his views as to the weight of evidence. Accordingly it has been observed that more efficiency and less delay in the administration of criminal justice is shown in those courts than in jurisdictions where this important function of the trial judge is not permitted to be exercised. The common law rule as recognized and followed in the federal courts is thus stated in 38 Cyc., pp. 1641-1645:

(1641) "CHARGING ON WEIGHT OF EVIDENCE OR AS TO MATTERS OF FACT. a. View that Practice Permissible. Statement of Rule. At common law, and in the absence of any constitutional or statutory restrictions, it is not error for the trial court, in its charge to the jury, to *express an opinion on disputed questions of fact, provided such questions are ultimately left to the jury for their decision*, without any direction as to how they should find the facts. This practice prevails in the courts of a number of states, where there are no constitutional or statutory (1642) prohibitions against it, *and in the federal courts, whose powers in this respect cannot be, and are not, controlled either by state, constitutional, or statutory* (1643) *provisions forbidding judges to express any opinion upon the facts*. Where this practice prevails the opinion of the court may properly be expressed, either directly, or inferentially

through the drift of its comments and the marshaling of facts in its charge, and the exercise of its discretion cannot be reviewed unless the courts fail to submit the questions of fact to the jury without direction as to how they shall find the facts, or plainly abuses its discretion. The fact that the opinion expressed is erroneous does not alter the rule.

Whether or not a trial judge will exercise his right of expressing an opinion on the facts depends upon his judicial discretion. Unless the circumstances are exceptional, he is not bound to do so, even on request.

Whenever the judge delivers his opinion to the jury on a matter of fact, it should be delivered as mere opinion, and not as direction, and the jury should be left to understand clearly that *they are to decide the fact upon their own view of the evidence*, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt. Ordinarily this duty is best performed by expressly informing the jury that they are the exclusive judges of the fact, and are not bound by the opinion of the court, and it has been held error to omit to so instruct, at least where the statute expressly requires it.

(1644) On the other hand it has been held that a charge on the facts is not objectionable for failure to accompany it with a statement that the jury alone are to weigh the evidence and determine the facts, especially where that power or duty is unmistakably suggested to the jury all through the charge. And in one jurisdiction it is said that if a party fears undue influence upon the jury of what the court says in regard to the facts, he may request an instruction that the jury, and not the court, are to determine the facts.

To what extent the right of expressing an opinion on the weight of the evidence may be

exercised depends upon the discretion of the trial judge, subject to certain limitations. It is said that a trial judge may express his opinion freely on the weight and value of evidence. Very strong expressions of opinion on the facts are tolerated, indeed sometimes may be necessary; and such an expression of opinion, however decided, is not the ground of an exception, if the jury are not misled, and if no binding direction is given to the jury to find in accordance with such opinion, and *all questions of fact are fairly submitted to them to decide upon their own judgment*. If the expression of opinion is made in such a manner that the jury may naturally regard it as a direction to them, and as excluding them from finding the fact for themselves, there being evidence, proper for them to consider, both for and against such direction, this is fatal error. Moreover all comments on the evidence must be made in such a manner as not to be one-sided or unfair. Within these limitations *it is the right of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by indicating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them.*"

In a note (No. 84), found on page 1642, many cases decided in federal courts are cited to sustain the language of the text as above quoted.

In the case of

Allis v. United States, 155 U. S. 117; 39 Law
Ed. 91,

the United States Supreme Court considered this rule that prevails in the federal courts allowing the expression of opinion as to the facts by the trial judge. Counsel for plaintiff in error there objected to certain language used by the trial judge in his charge. They contended in their argument as follows:

(Law Ed. 91) "The court, after recalling the jury, proceeded to argue to them with great energy the question of intent, a question within their province and not within that of the judge. The court and jury have separate and totally distinct offices to perform. Each should confine itself rigidly to its own sphere. The former is to decide the law and the latter the facts. * * * When a charge is argumentative, this furnishes ground for reversal if it is calculated to mislead the jury."

The opinion is by Mr. Justice Brewer. In the course of the opinion, the learned justice said:

(Law Ed. 93) "The other errors complained of are in the charge to the jury. It appears from the bill of exceptions that after the jury had been deliberating for several hours on the case, the court called them into the courtroom and inquired if they had reached a verdict. On being informed that they had not, the court asked if there was any portion of the charge the re-reading of which would be of any assistance to them. To which question the foreman responded that a portion thereof was not fully understood by all of the jury, to wit, that in reference to the weight of the testimony of the witnesses. Thereupon the court re-read that portion. It further stated that the jury were at liberty to conduct their deliberations as they chose, but that he would call their attention

again to the part of the charge relating to the fourteenth, fifteenth, eighth and ninth counts of the indictment, and proceeded to re-read that part. In the portion re-read, after a reference to the alleged false credit of \$50,000, was this language: *'And if he caused these entries to be made, with what intent did he do so? If a customer or friend of yours who owed you \$40,000 on account should come to you and tell you that he had deposited \$50,000 to your credit in the German National Bank of Little Rock, and that he wanted a receipt for the \$40,000 that he owed you and wanted a credit for the other \$10,000, and you should give him the receipt and the credit, and should subsequently learn that he had never deposited one dollar in that bank for you, with what intent would you conclude he had made these statements? Would you think it was with an honest purpose or with some intent to injure or defraud you?'*

The bill of exceptions also contains other parts of the charge as follows:

You are not bound to be governed by any statement of the evidence made by the court, but if your recollection accords with that of the court you may accept it, and if it differs from it you may be governed by your own memory. It is your exclusive province and duty to determine the issues of fact here presented and the weight and credibility of the testimony of the witnesses, and by your determination of these questions the court will be bound. If in the course of what the court may say to you any expression of opinion should drop as to the disputed issues of fact or the credibility of the testimony of the witnesses you are not bound by any such expression, but it is your privilege to adopt or disregard it as you may see fit.

The court has reviewed the counts on this indictment and called your attention to some of

the important evidence in the hope that this might be of some assistance to you in reaching a just verdict. There is much testimony bearing upon many of these counts that has not been called to your attention. You will consider that as carefully and as well as that which has been referred to and will remember that whatever may have been said by the court you are the exclusive judges of the questions of fact and of the credibility of the witnesses.' Closing its remarks to the jury at the time of their recall it said: 'Of course, gentlemen of the jury, you must consider all the other parts of the charge heretofore read to you also. I have simply called your attention to these four counts, thinking possibly I might assist you in arriving at a just conclusion.' "

The defendant excepted to the action of the court in recalling the jury and using the language above set forth. The Supreme Court said:

(93) "It is now insisted that the court expressed an opinion as to the inference to be drawn from the facts, argued the question of intent to the jury and sought to coerce a verdict.* * * (94) The specific matters excepted to are: 1st, the action of the court in recalling the jury; 2nd, its arguing the testimony; 3d, its stating part of the testimony on certain points without stating the entire testimony. It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to

the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given.

So far as 'arguing the testimony' is concerned, the only part of the charge that can be considered as even tending in that direction was that part referring to the question of intent. We see nothing in this of which any just complaint can be made. The illustration given by the court was apt and fair, and if it bore hardly upon the defendant it was only because the transaction, of which he was charged, was one of like character and indicative of the same intent. The illustration was put in the form of a question, and no affirmation was made as to the intent that must be presumed therefrom. Even if it contained an expression of opinion such expression is permissible in the Federal courts. *Simmons v. United States*, 142 U. S. 148 (35:968); *Doyle v. Union Pac. R. Co.*, 147 U. S. 413 (37:223).

So far as respects the complaint that the court stated part of the testimony on a certain point without stating all, we know of no rule that compels a court to recapitulate all the items of the evidence, even all bearing upon a single question. There was no intimation that all the testimony bearing upon any particular point was stated. On the contrary the plain declaration was that there was other testimony than that mentioned, and the jury were admonished to give that not mentioned as full and careful consideration as that mentioned.

So far as the record discloses, the charge of the court and its rulings on the trial were eminently fair and considerate of the rights of the defendant. In none of the matters referred to do we find any error, and therefore, the judgment is affirmed."

A case frequently cited on the rule here under consideration followed in the federal courts is

Reagan v. United States, 157 U. S. 305; 39 Law Ed. 709.

The second subdivision of the syllabus in that case, which is fully justified by the opinion, states the rule as follows:

“It is not error, in a criminal trial where the defendant is a witness, for the court to instruct the jury that where the witness has a direct personal interest in the result, the temptation is strong to color or withhold the facts, and that *the deep personal interest which defendant has should be considered by the jury in weighing his evidence.*”

In the opinion of Mr. Justice Brewer, Law Ed. 710, the following is found:

“A second objection is that the court gave this instruction: ‘*You should especially look to the interest which the respective witnesses have in the suit or in its result.*’ Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. *The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.*’

By the Act of March 16, 1878 (20 Stat. at L. 30) a defendant in a criminal case may, ‘at his own request but not otherwise, be a competent witness’. Under that statute it is a matter of

choice whether he become a witness or not and his failure to accept the privilege 'shall not create any presumption against him'. This forbids all comment in the presence of the jury upon his omission to testify. * * *

On the other hand, *if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens.* * * * The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As to that he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much credence he is entitled to.

It is within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility. * * * The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. * * * *This rule is equally potent in criminal as in civil cases, and in neither is it error for the trial court to direct the attention of the jury to the interest which any witness may have in the result of the trial as a circumstance to be considered in weighing his testimony and determining the credence that shall be given to his story."*

Another case which recognizes the right of the trial judge to express his opinion on questions of fact which he submits to the trial jury for determination, is

Simmons v. United States, 142 U. S. 148; 35 Law Ed. 968.

In that case a jury which had been a long time engaged in deliberating on their verdict came into court and asked to be discharged from further consideration of the case. The report of the case shows the following:

“To this request the court, after ascertaining by inquiry that the jury required no further instructions in matter of law, replied as follows: ‘This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. *Whenever in the opinion of the court the testimony is convincing, it is the duty of the court to hold the jury together.* Therefore I must decline your request to be discharged.’

The defendant excepted to the judge’s statement to the jury that he regarded the testimony as convincing * * *.”

The error thus charged against the trial judge is disposed of in the opinion of the court affirming the judgment, as follows:

“The only other exception argued is to the statement made by the judge to the second jury,

in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he had told them, in so many words, that the facts were to be decided by the jury, and not by the court. And it is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinions upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite plainly and strongly expressed to the jury as in the case at bar. *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545 (30:257); *United States v. Philadelphia & R. R. Co.*, 123 U. S. 113 (31:138); *Lovejoy v. United States*, 128 U. S. 171 (32:389)."

Lovejoy v. United States, 128 U. S. 171; 32 Law Ed. 389.

In affirming the judgment and disposing of an exception to certain language of the trial judge, expressing his opinion in that case, the court, speaking by Mr. Justice Gray, said:

(390) "It is established by repeated decisions that a court of the United States, in submitting a case to the jury, may at its discretion express its opinion upon the facts, and that such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury. The charge of the circuit court in the present case was clearly within the rule. *Rucker v.*

Wheeler, 127 U. S. 85, 93 (32:102, 105), and cases cited."

Allen v. United States, 164 U. S. 492; 41 Law Ed. 528.

The plaintiff in that case had been convicted on a charge of murder. Objection was made to the charge of the trial judge in the matter of the presumption against the accused person, growing out of the circumstances of flight.

At page 530, Law Ed., Mr. Justice Brown said:

"The 14th assignment is to the following language of the court upon the subject of the flight of the accused after the homicide: 'Now, then, you consider his conduct at the time of the killing and his conduct afterwards. *If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration against him because the law says unless it is satisfactorily explained,—and he may explain it upon some other theory, and you are to say whether there is any effort to explain it in this case,—if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this monitor called conscience that teaches us to know whether we have done right or wrong in a given case.*'

In the case of *Hickory v. United States*, 160 U. S. 408, 422 (40:474, 479), where the same question as to the weight to be given to flight as evidence of guilt arose, the court charged the jury that 'the law recognizes another proposition as true, and it is that "the wicked flee when no man pursueth, but the innocent are as bold as a lion"'. That is a self-evident proposition that has been recognized so often by man-

kind that we can take it as an axiom and apply it to this case.' It was held that this was error, and was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and conclusive that it was the duty of the jury to act on it as an axiomatic truth. So, also, in the case of *Alberty v. United States*, 162 U. S. 499, 509 (40:1051, 1056), the court used the same language, and added that from the fact of absconding the jury might infer the fact of guilt, and that flight was a silent admission by the defendant that he was unwilling or unable to face the case against him, and was in some sense, feeble or strong, as the case might be, a confession. This was also held to be *error*. But in neither of these cases was it intimated that the flight of the accused was not a circumstance proper to be laid before the jury as having a tendency to prove his guilt. Several authorities were quoted in *Hickory v. United States*, 160 U. S. 417 (40:477), as tending to establish this proposition. Indeed the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to prove his guilt. *Whart. Hom.*, Sec. 710; *People v. Pitcher*, 15 Mich. 397.

This was the substance of the above instruction, and although not accurate in all its parts, we do not think it could have misled the jury."

Johnson v. United States, 157 U. S. 320; 39 Law Ed. 717-719.

At page 719 Law Ed. Mr. Justice Brewer uses this language, referring to this subject:

"Complaint is made of the instruction as to the weight to be given to the defendant's personal testimony. That instruction was in the following terms: 'The defendant goes upon the stand before you and he makes his statement;

tells his story. Above all things in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it.'

This instruction must be taken in connection with about a page of the charge which immediately preceded it, in which the court laid down certain general rules for weighing the evidence of any witness, naming among them his bearing and conduct in the presence of the jury, his manner in giving his testimony, the character of the story told by him, its harmony or contradiction with other testimony, the opportunities the witness had for knowing the facts of which he testifies, and the motive, by reason of interest or feeling, which may influence him, saying in conclusion that 'if the interest is a very great one, if it is a very large one, it is more apt that he would be swayed—it might be unconsciously—away from the truth than if such interest did not confront him. You are simply to weigh that evidence in connection with the statements of the other witnesses in the case, whether it is the defendant or anybody else.' After these general observations follows the particular language which is objected to, but in view of that which preceded, it cannot be said that, by it, the defendant was deprived of any advantage to which he was justly entitled in having his personal statement considered by the jury. If such statement was corroborated by facts otherwise proved it was thereby strengthened; if it was not so corroborated it was still to be considered in and of itself, and in the light of 'its own inherent proving power'. *Reagan v. United States*, ante, p. 709."

Wiborg v. United States, 163 U. S. 656; 41 Law Ed. 289, 298.

The judgment in that case was reversed for errors in other particulars, but the rule on the subject of an expression of opinion by the trial judge is referred to in the opinion of Mr. Chief Justice Fuller, at page 298:

“An exception was taken to the statement of the court that the men were armed. The court said: ‘They were armed, having rifles and cannon, and were provided with ammunition and other supplies.’ This statement was based on uncontradicted testimony, and occurring as it did in a recapitulation of the evidence, no rule of law being incorrectly stated and the matters of fact being specifically submitted to the determination of the jury, we do not regard the exception as tenable. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 574 (34:784, 787).”

See also in this connection:

St. Louis &c. Ry. v. Vickers, 122 U. S. 360; 30 Law Ed. 116;

Spurr v. United States, 87 Fed. 708;

Southern Bell Tel. Co. v. Watts, 66 Fed. 460-467.

Many other cases might be cited to sustain this proposition, but it has been so frequently and thoroughly recognized in the federal courts that we forbear further citation on the point.

The questions discussed in this section of our argument involve certain portions of the charge of the trial judge which are attacked by counsel for plaintiff in error.

In Subdivision I at pages 14-66 of their brief they argue that certain language quoted by them on pages 15 and 16 (390-391 of the Record) and used by the trial judge in his charge, constituted reversible error. In our judgment the language used comes within the recognized rule of the right of the trial judge to express his opinion upon matters of fact. A proper understanding of the subject and a proper disposition of appellant's Point I and of our points made in this brief, numbered I and II, requires that certain other portions of the charge referring to the same general subject matter, including those which state the functions and powers of the trial jurors in disposing of questions of fact be directly called to the attention of this court.

In this Subdivision I of our argument we have discussed the proposition that a trial judge in the courts of the United States has the undoubted right to express his opinion on the facts before the jury and the inferences properly deducible therefrom. In the next following subdivision of our argument we shall take up the proposition that a defendant who voluntarily takes the stand as a witness, waives his immunity from comment on his testimony as given. Comment may also be made on his silence while on the stand when confronted with incriminating testimony as to matters presumptively within his knowledge.

The chief portions of the charge pertinent in regard to this matter are the following:

The language quoted by counsel is found in a portion of the charge set out at pages 389 to 392, as follows:

“The evidence introduced before you by the Government, if believed by you, is sufficient in legal effect, that is, in law, to sustain the conviction of the defendant upon each one of the several counts of the indictment, but whether it is such as to satisfy you of its truth and establish the guilt of the defendant to the degree I have indicated is, as I have heretofore stated, *a question solely for your consideration. The evidence is all before you, and it is for you to say where the truth rests.* The defendant has taken the stand in his own behalf, and, so far as his testimony tends to cover the transaction involved in the charges against him, *it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy, he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested (390) the idea of leaving Sacramento alone she protested that she should not be left behind, but should go with him; and that it was she, and not the defendant, who insisted that Miss Norris should accompany them. Now this conflict so far as it exists, is for you to determine; that is, you will say whether the statements of these girls are true, or that of the defendant, to the extent that you find it material to determine in order to reach your verdict. The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution. After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to*

show the trip to Reno was taken, *he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken*, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. *But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration.* A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but *where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.*

If you find that these girls were taken to Reno by the defendant and his companion Caminetti in the manner charged, then the only question remaining is as to the intent with which they were so taken. As to this question,

if the evidence of the defendant and his witnesses as to the reasons actuating him in leaving Sacramento, and the intent he had in mind, is not such as appeals to your hard, practical reason and common sense, in the light of the other evidence and when all his acts are considered, you are not compelled to believe it, no matter how strongly asserted. There is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. Therefore, if you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Caminetti cohabited with them, as the testimony tends to show, then you may find that they were taken there with the immoral purpose and intent charged. That is, if the declarations of the defendant as to his intent and purpose do not accord with his acts you may discard his words if they do not carry conviction to your minds, and base your finding as to his intention upon the acts committed by him.

And even if you find that the defendant and his companion Caminetti were actuated in their (392) departure or flight from Sacramento by a fear of exposure or arrest, but that nevertheless in taking these two girls with them there existed the intention to subject them to the immoral purpose charged, the defendant is guilty. If that immoral purpose was one factor inducing him to leave Sacramento and take these girls with him, it matters not that he may also have been actuated by his fears or other consideration moving him to take that trip. He would nevertheless be guilty.

Now, gentlemen, with these suggestions, I submit this case to you. My duty is finished, and the issue rests with you."

CHARGE AS TO SPECIFIC INTENT.

At pages 378-379 the trial judge instructed the jury on the subject of specific intent in the language following:

“You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of the intent so alleged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced. It is therefore essential to the guilt of the defendant under any one of these counts that this intent be made to appear. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent or purpose with which a given act is committed, however, need not be shown by any open declarations of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Indeed if such were (379) not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men committing a wrongful act do not ordinarily pro-

claim in any open, definite manner the real purpose or intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established.

CREDIBILITY OF DEFENDANT AS A WITNESS.

At pages 384-385 the court instructed the jury as to the proper method of weighing the testimony of the defendant as a witness, in the language following:

“Where a defendant takes the witness stand, his evidence is to be judged by the same rules which are applied in determining the credibility of any other witness. That is, he is not to be discredited merely upon the ground that he is the defendant. You are to accord him the same fair and impartial consideration of his evidence, when viewed in the light of all the other facts in the case, as you would the testimony of a witness standing in any other relation to the case; but in passing upon the evidence of a defendant you have a right, precisely as with any other witness, to consider the interest he has in the result of the trial, and determine for yourselves how far that interest may have tended to color his evidence or cause him to deviate from the truth. You will understand from this merely that while there is no presumption against the truth of the evidence of a defendant any more than that of any other witness, nevertheless you are entitled to consider the interest he necessarily has in the result of the trial and determine to what extent it may have tended to affect his testimony before you. If, when tested by these rules, it does not accord with your reason as being true, then you are not required to believe it.”

As we have seen in the language above quoted from the charge, the jurors were advised that the testimony of the defendant witness was to be *measured by the same rules as the testimony of other witnesses*. The jury were instructed on the subject of the credibility of witnesses generally in this language of the charge found at pages 383-384 of the record.

“In determining the credibility of a witness you will bear in mind that every witness is presumed to speak the truth; but this presumption may be overcome by the manner in which he testifies or the character of his testimony. The jury should take into consideration his character and conduct as disclosed, his relation to the controversy and to the parties, if any, his expressed or apparent bias or partiality, the reasonableness or unreasonableness of the statements he makes, and all other elements which tend to throw light upon his credibility. *The manner of the witness upon the stand is to be observed*, and the testimony he gives tested by the rules of reason and common sense. You note how far his evidence accords with the other facts as proven in the case; how far it is inconsistent with those facts, how far it is probable or improbable in itself or when viewed in the light of the other evidence on the question as to which the evidence of the witness has been addressed, and from all these considerations you determine the weight which you will give to the testimony of any witness. The fact that a witness appears to be merely mistaken as to some feature of his evidence does not necessarily discredit him in other respects, (384) although it may properly make you more careful in the consideration of the rest of his testimony; but if a witness comes upon the stand and testifies to what you believe, in view

of the other evidence in the case, to be a deliberate falsehood, uttered with an intent to deceive, then you have a right, in your wisdom, to discredit all his testimony and to discard it from your consideration, unless the other evidence in the case satisfies you that in some respects he has told the truth. *This applies to all the witnesses alike.*”

The jury were thoroughly advised as to the relative functions to be discharged by the trial judge and by the jurors—they were fully advised that the ultimate determination of the facts was to be made by them rather than by the trial judge.

At pages 382-3 is found a portion of the language used by the trial judge with reference to the rule that the ultimate determination of the facts of a case must rest with the jurors as the triers of the facts, as follows:

“While, as I have stated, it is the duty of the court to declare the law, and that of the jury to be governed by it in their consideration of the evidence, *it is, on the other hand, the province and right of the jury to pass upon the facts in the case and the credibility of the witnesses. With those functions the court has nothing to do*, other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and *it is neither the province nor the disposition of the court to intentionally interfere with that duty of the jury. If, therefore, during the progress of this trial you have gathered any impression from anything which the court may have uttered in your presence, as to the views or judgment of the court on the question of the defendant’s guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you*

will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum of the evidence discloses; and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. Any evidence that during the course of the trial has been primarily admitted in evidence and thereafter withdrawn is out of the case for any purpose for your consideration. And in this connection, as requested by counsel for the defendant today during an incidental argument, I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness-stand or in the way of exhibits or other physical evidence which may have gone in before you."

THE UTTERMOST OFFENDING OF JUDGE VAN FLEET AND GOVERNMENT COUNSEL.

The main burden of the complaint made by plaintiff in error against the trial judge and counsel for the government is that they each and all assumed and stated in the presence of the defenseless jurors that they, in passing upon the evidence of the case for the purpose of their ultimate finding as to the facts, had a right to take into consideration the failure or the omission of the defendant when on the stand to deny or explain the incidents of the Reno trip or to make any direct statement of the intent or purpose with which that trip was taken.

All adjudicated cases, even those which hold most strongly in favor of accused persons appealing from judgments of conviction, recognize the established rule that reversal for the expression of opinions as to the facts by a trial judge or comment by a judge or counsel as to the silence of a defendant sworn at his own volition as a witness is justifiable only where the conduct of court or counsel constitutes a substantial prejudice to the rights of the defendant.

In order that the conduct challenged on the part of court or counsel may amount in the eyes of an appellate tribunal to a ground for reversal, it is incumbent on plaintiff in error to show that the conduct challenged resulted in establishment in the minds of the jurors—the triers of facts—of views or impressions as to those facts which otherwise might not be entertained by the jurors. If the action of the court or of counsel accomplishes no other impression on the mind of the jurors than that definitely fixed therein by unquestioned evidence in the cause, there can be no resulting injury. If there be no injury—no prejudice—there can be no reversal for such conduct of court or counsel.

What possible injury is shown by this record to have resulted from Judge Van Fleet's expression of opinion as to the presumption of fact arising from the defendant's significant silence on the stand as to the incidents of the Reno trip? Diggs himself testified at page 348, without any objection whatever from his counsel: "We left for Reno two weeks after meeting her on the levee."

At page 358 he was asked what was meant by the Reno trip? Some objection was made to the question on the ground it was not proper cross-examination. His answer to the question was:

“A. It is perfectly evident what trip it was.

Mr. SULLIVAN. Well, what do you mean? The trip that you and Caminetti and Miss Norris and Miss Warrington took from Sacramento to Reno?

(359) A. Yes, sir, the trip I took to Reno; yes, your Honor. I took but one trip to Reno in March, 1913.

Q. And on that trip were you accompanied by Mr. Caminetti, Miss Norris and Miss Warrington?

A. They were along, yes.”

It was to the Reno trip and the incidents thereof and the purpose with which it was made that Judge Van Fleet addressed that portion of his charge from which a fractional sentence is taken and placed in the heading of Subdivision I of the argument of counsel for plaintiff in error, at page 14.

We have above called attention to portions of the charge in which that fraction of a sentence is found. Let us analyze that section of the charge and see what the trial judge really did say. What was the actual extent of his exceeding great offending? The portion of the charge referring to this matter begins on page 389 with this preliminary suggestion: “The evidence is all before you and *it is for you to say where the truth rests.*” Furthermore, in this cautionary way which characterized the conduct of the judge all through his charge, he said, after calling

attention to the conflict between the testimony of the two girls and that of defendant Diggs:

“Now, this conflict, so far as it exists, is for you to determine. That is you will say whether the statements of these two girls are true or that of the defendant, to the extent that you find it material to determine in order to reach your verdict.”

Let us see whether the trial judge in this portion of his charge misstates any matter of fact. In the first place, after the initial sentence above quoted by us in which the jurors were advised of their absolute right to determine the facts, he says: *“The defendant has taken the stand in his own behalf.”* There is here neither misstatement of facts or of law.

“In so far as his testimony tends to cover the transactions involved in the charges against him, it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested the idea of leaving Sacramento alone she protested that she should not be left behind but should go with him; and that it was she, and not the defendant, who insisted that Miss Norris should accompany them.”

In this language of Judge Van Fleet there is neither misstatement of fact nor any misstatement of a rule of law. The defendant certainly took the stand voluntarily. His statement of the reasons for the Reno trip certainly is at variance with that

as given by the girls. In Judge Van Fleet's reference to that matter there is neither misstatement of fact nor of law. That Diggs insisted that Miss Warrington was the one who insisted on Lola Norris accompanying the others on the trip is beyond all question of fact. The reference to it contains no misstatement of any rule of law.

There certainly was a conflict between the testimony of the two girls and that of Diggs. On that subject there was, on his part, *an absolute statement of his position rather than silence or failure to explain his attitude.*

When Judge Van Fleet advised the jury that this matter of conflict was to be settled by them he stated that to which no one can take any just exception.

Following the language quoted, Judge Van Fleet says:

(390) "*The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution.*"

This is certainly a statement of a matter of fact clearly within the judge's proper function and not a statement of any matter of law. As a matter of fact Diggs testified to nothing occurring after the time they reached the Sacramento station and before they reached their Reno destination. The judge next says:

"After testifying to the relation between himself and Caminetti and these girls down to Sunday night on which the evidence of the Government tends to show the trip to Reno was

taken, he stops short and has given none of the details or incidents of that trip, nor any direct statement of the interest or purpose for which that trip was taken, contenting himself by merely referring to it as having been taken and by testifying to his state of mind for some days previous to the taking of that trip."

In this language there is neither misstatement of fact nor misstatement of any rule of law appropriate to the fact under consideration.

After referring to the limitation of cross-examination of the defendant as a witness, the court next said:

"But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration."

The matter directly involved in this sentence taken from the charge will engage our attention in the next subdivision (II) of the argument.

This portion of the charge is in this language:

"A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but, where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness.

(391) and if his failure to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, *such failure may not only be com-*

mented upon but may be considered by the jury with all the other circumstances, in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

The judge stated the law when he said that a defendant is not required under the law to take the witness stand. No exception can be taken to that. He next said, "He cannot be compelled to testify at all." That is a correct statement of the law.

The next suggestion was, "If he fails to do so no inference unfavorable to him may be drawn from that fact." That language certainly is law.

"Nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence."

The language quoted is clearly law.

"But where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness."

That language is clearly law, as we shall show more directly in the next following subdivision of our argument.

The judge continues:

"If he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence."

In connection with this language we ask the court to bear in mind that the "acts of an incriminating nature" in connection with the Reno trip must refer under the facts of the record to *Diggs' purchase of the train tickets* testified to by both girls, and *his purchase from the Pullman conductor of the drawing room for their transport to Reno* and of *the occupancy by himself and Marsha Warrington of the lower berth and the occupancy by Caminetti and Lola Norris of the upper berth during the transit and the conversation occurring on the train and long before reaching Reno as to the intention of Diggs and Caminetti to secure a cottage or bungalow in Reno wherein they might live during their stay in Reno*. No sane, human mind can doubt, under the evidence of this record, that *Diggs purchased the tickets*. No sane, human mind can doubt that *Diggs secured the drawing room, for the use of the party of four under his charge as "boss" or manager*. No sane, human mind can doubt that before reaching Reno and between their time of arising at eight o'clock in the morning and the time of reaching the state line, that *he and Caminetti, in the presence of the two girls, had discussed their intention of securing an abiding place for these birds of passage during their stay in Reno*. Before they had secured their temporary domicile in the Riverside Hotel they had already hunted out a real estate office and made their preliminary negotiations for securing the bungalow. As to these facts there can be no question. As to the finding of the

jury with reference to these facts, no possible injury or prejudice could have resulted from any language of the trial judge in the course of his charge, to which we have above called attention.

Following the language last above quoted from this section of the charge, Judge Van Fleet used the language incorporated by counsel in their heading of Subdivision I of their argument:

“And if he has failed to deny or explain *acts of an incriminating nature* that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury, with all the other circumstances, in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.”

The “*acts of an incriminating nature that the evidence of the prosecution tended to establish against him*” in connection with the trip to Reno, were the acts above referred to,—*the purchase of the tickets, the purchase of the Pullman accommodations, the occupancy of the same drawing room and the preliminary arrangements for the securing of quarters for the party of four while in Reno.*

We insist and shall argue in the next subdivision of this brief that *the silence of defendant as to the several incriminating facts just noted was clearly a matter to which the trial judge had a right to call the attention of the jury, and clearly a matter to which counsel for the government had a right to refer in their argument.* Certainly these facts as

to which there was positive testimony by the government and no denial by the defendant were matters which according to every theory of law or fact might properly be taken into consideration by the jury in arriving at their conclusion as to the guilt or innocence of defendant.

But the language to which counsel most seriously invite attention is

“It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him, he would have done so.”

The portion of the charge in which the trial judge, by virtue of his prerogative, called attention to the failure of the defendant to testify while on the stand, bore directly upon the question of guilty criminal intent in making the trip from Sacramento to Reno. The circumstances of that trip, as testified to by the trainmen and by the two girls, were competent and highly persuasive evidence to establish that the purpose of Diggs, as well as that of Caminetti, in making the trip, was that these two girls should abide with them while in Reno as their mistresses or concubines. The conduct of Diggs while on the trip, as testified to by the girls, was proper to be taken into account by the jury in ascertaining as an ultimate fact, what was the actual purpose of Diggs in making the trip. Diggs was a witness in his own behalf. His testimony as given was for the purpose of denying any such intent in making the trip as that ascribed to him by the government.

Being on the stand, the facts testified to by the girls and the train men being matters of the utmost importance to him, in connection with the question of guilty intent, it was the most natural thing in the world to expect that while a witness and while on the stand, if the matters testified to by the girls and the train men were not true, that he should have denied them. It was a natural inference or presumption from such a failure to deny that no denial could truthfully be made by him. It was a presumption or inference from the facts before the jury, properly deducible therefrom, to which the trial judge had the absolute right to call the attention of the jury in order to aid them in a proper determination of the questions submitted to them.

III.

Diggs, the Plaintiff in Error, Having Voluntarily Taken the Witness Stand, Waived All Immunity. His Silence, as Well as His Testimony and Conduct, Were Legitimate Subjects for Criticism and Comment by the Court and Counsel for the Government.

At pages 14 to 66 of their brief, in Subdivision I of their law argument, counsel for plaintiff in error discussed the proposition thus stated on page 14:

“The trial court erred in charging the jury to the effect that if he (defendant) has ‘failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him, such failure may not

only be commented upon, but may be considered by the jury with all the other circumstances, in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him, he could have done so."

The point thus stated and argued at the pages indicated in the Diggs brief, is the same as Point III urged by counsel for Caminetti in the companion case, shown at pages 85 to 146 inclusive, of their brief. The questions presented in the briefs of the two plaintiffs in error, at the points indicated, have been heretofore discussed by us in our reply to the Caminetti brief, at pages 73 to 90, in Subdivision IV of our argument. The two cases are based on substantially the same facts, involve the same parties, involve identical questions of law, and have been argued together in this court. Under those circumstances, we deem it proper, instead of extending the quotations made from the several authorities cited by us in our brief in the Caminetti case, to call attention to the pages of that brief at which authorities have been cited and quotations made therefrom. In this way we may, to some extent, lighten the labors of the court and lessen the volume of our argument.

The criticism made in both briefs of the language of the trial judge is based mainly on the case of *Balliet v. United States*, 129 Fed. 689, 696.

That case is said to sustain the doctrine that the trial court, in the language quoted by counsel on

pages 15 and 16 of their brief, committed reversible error. In our judgment the Balliet case lays down no such doctrine. If it asserts the doctrine claimed by counsel and is the leading case on the subject, it is somewhat remarkable that it has never been at any time cited by any federal court as sustaining the doctrine here contended for by plaintiffs in error. It certainly does not repudiate the doctrine of the long line of cases cited in the preceding subdivision of our argument, holding that it is the duty, as well as the privilege, of the trial judge, in a jury case, to state his views or opinions as to the facts to be determined by the jury, *if he finally leaves the determination of those facts in the hands of the jurors themselves*. As we have shown in the concluding pages of the preceding subdivision of our argument, the trial judge fully, clearly and repeatedly advised the jurors that *whatever his views as to the facts might be, whatever expression he might have given to his opinions on the subject before the jury, they should finally determine all such matters for themselves*. He fully instructed the jury that *the burden of proof was upon the government*. He instructed the jurors further that *the testimony of the defendant who had taken the witness stand was to be measured in the same way as the testimony of other witnesses whose testimony was before them*. He did tell them, it is true, as claimed by counsel, that in weighing his testimony they might take into consideration the fact of which they were perfectly conscious, that while on the stand the defendant

maintained an absolute silence as to the events occurring on the train between the time they left Sacramento shortly after midnight, and the time they reached Reno next morning. He stated what is generally recognized as the law in these United States, that *the silence or failure of defendant, while on the stand, to explain or deny incriminating circumstances shown by the testimony of the prosecution, was a circumstance to which they might give weight in passing on the testimony.* He further said "*It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him he would have done so*". In giving that advice to the jury he stated a rule generally recognized in American courts. The *Balliet* case does not repudiate that rule. The immunity from criticism or comment on the action of a defendant testifying on his own behalf in a criminal trial is supposed to arise under the statute of March 16th, 1878 (20 Stat. L. 30) which provides:

"In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the United States Courts * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

At pages 81-3 of our Caminetti brief we called attention to the case of

Fitzpatrick v. United States, 178 U. S. 304,
316; 4 L. Ed. 1083.

An extended quotation from that case is found on the pages indicated. In the quotation, at page 83, appears the following:

“While the court would probably have no power of controlling an answer to any question, *a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury.* (State v. Ober, 52 N. H. 459); and it is also held, in a large number of cases, that *when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses.*”

At pages 74 to 77 we called attention to

State v. Ober, 52 N. H. 459; 13 Am. Rep. 88, 91.

We ask attention of the court to the quotation there made by us from the *Ober* case. In the opinion, criticism is made of the language of Judge Cooley in his work on Constitutional Limitations (p. 317). On pages 76-77 of our Caminetti brief, we called attention to a note following the report of the case found in 13 Am. Rep. The reporter there calls attention to a note in the third edition of Judge Cooley's work on Constitutional Limitations, referring to the *Ober* case. In the 7th edition of the same work, page 449, we find a note in this language:

“In State v. Ober, 52 N. H. 459, 33 Am. Rep. 88, the defendant was put on trial for an illegal sale of liquors, and having offered himself as a witness was asked on cross-examination a question directly relating to the sale. He declined to answer *on the ground that it might*

tend to incriminate him. Being convicted, it was alleged for error that the court suffered the prosecuting officer to comment on this refusal to the jury. The supreme court held this no error. This ruling is in entire accord with the practice which has prevailed without question in Michigan, and which has always assumed, that the right of comment where the party makes himself his own witness and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstains from asserting the statutory privilege.

* * * * *

“Under the Michigan practice, when the court had decided the question to be a proper one, it would have been left to the defendant to answer or not, at his option, but if he failed to answer what seemed to the jury a proper inquiry, it would be thought surprising if they gave his imperfect statement much credence.

“On this point see further, State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688.”

It will be observed that Judge Cooley here recognizes the distinction between *compelling a defendant on the stand to answer a question*, and thus afford evidence against him, and *commenting on the fact that while voluntarily on the stand as a witness he failed or declined to testify on a matter pertinent to the issues involved*. He distinctly recognizes that the *imperfect or partial statement* of a witness could not claim the same credit in the minds of the jurors as *a complete statement* on the same subject.

As we have seen Cooley's footnote cites

State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688.

After a review of the authorities on the subject it was held in that case, as shown by the syllabus, that:

“The defendant, in a criminal prosecution, became a witness at his own request. Held

(1) That he thereby waived the constitutional provision that an accused person shall not be compelled to give evidence against himself;

(2) That he could not refuse to answer questions put on cross-examination to discredit his direct evidence, on the ground that answering would incriminate himself; and

(3) That privilege from answering questions on the ground that they tend to criminate the witness is the privilege of the witness and not of his counsel.”

The *Ober* case is cited in the *Wentworth* case as one of the authorities sustaining the position taken by the court. We shall now call attention to a number of authorities cited by us in our former brief, and the pages of that brief at which they will be found.

12 Cyc., pp. 576-7, quoted on pages 73-4.

Wharton's Criminal Evidence, Sec. 681, quoted on page 74 of our Caminetti brief.

State v. Ober, 52 N. H. 459; 13 Am. Rep. 88-91, pages 74-7.

Stover v. The People, 56 N. Y. 315, quoted at pages 77-9.

People v. Mead, 145 Cal., quoted at page 79.

People v. Wong Bin, 139 Cal. 65-6, shown at pages 79-80 of our Caminetti brief.

State v. Harrington, 12 Nev. 129-131, shown in former brief, pages 80-81.

U. S. v. Fitzpatrick, 178 U. S. 304, 316; 44 L. Ed. 1083, shown at pages 80-83.

We call attention to a short portion of the excerpt from the opinion in the *Fitzpatrick* case, given by us at pages 82-3.

“Where an accused party waives his constitutional privilege of silence, *takes the stand in his own behalf and makes his own statement*, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. * * * Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are. * * * While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury (*State v. Ober*, 52 N. H. 459).”

At pages 83-4, we called attention to the case of *Powers v. United States*, 223 U. S. 303-316; 56 L. Ed. 448.

At pages 84-5 we called attention to *Sawyer v. United States*, 202 U. S. 150, 168; 50 L. Ed. 979.

At page 85 we called attention to *Cotton v. The State* (an Alabama case), reported in 6 So. 372.

The doctrine laid down in that case was thus stated:

“Where defendant elects to become a witness in his own behalf, *his failure to explain incriminating circumstances is a matter to be considered by the jury, and he is not protected from the criticism of the state’s counsel* by Crim. Code Ala. sec. 4473, providing that his failure to become a witness shall not be a subject of comment by counsel.”

On the same page (85) of our Caminetti brief we cited *Graves v. State*, decided by the Supreme Court of Alabama, 7 So. 317; and *Clark v. State*, 78 Ala. 474.

At pages 85-6 we called attention to *State v. Glade*, decided by the Supreme Court of Kansas, 33 Pac. 8.

At pages 88-90 we called attention to the language of the judges in the Balliet case, for the purpose of showing that the question there presented was not the same question as that here under consideration. The Balliet case makes no attempt at disturbing the recognized doctrine that a federal trial judge has a right to express his views as to matters of fact in the presence of the jurors, in order to aid them at arriving at an intelligent solution of the questions submitted to them for consideration.

The Balliet case does not rule that a presumption or inference of fact does not arise in the case of a defendant witness, who, while on the stand, remains silent in the face of inculpatory or incriminating evidence. The criticised language of the Balliet decision is not the language here. The Balliet charge

as a whole is not before us. The language quoted by counsel and set out in the opinion of the court, taken with what surrounded it in the charge may have been misleading or confusing on the subject of *material facts* or *burden of proof*. Here the language is absolutely clear and is neither misleading nor confusing.

The incriminating circumstances with reference to which the silence of the defendant might be taken into account in the Diggs case were clearly pointed out by the trial judge and the matters as to which Diggs remained silent are directly indicated by him. The silence of the witness with reference to those incriminating circumstances being called to the attention of the jury it was clearly within the function of the trial judge to state that "could he have truthfully denied or explained the incriminating evidence against him he would have done so." The law on the subject of the burden of proof was elsewhere and properly called to the attention of the jury. The facts material to be considered by the jurors in arriving at their conclusion were also likewise thoroughly called to the attention of the jury in other portions of the charge.

As claimed in our former brief, the general trend of American authority—the practically unanimous holding of our American courts—is to the effect that it is proper for a judge or prosecuting counsel to comment on the testimony of the defendant witness who has failed to explain incriminating circumstances shown by the government in the case presented against him.

We ask attention to a few additional cases stating this same general doctrine. The matter is discussed in

4 Wigmore on Evidence, Sec. 2276.

After referring to the distinction between a defendant and an ordinary witness on the stand, the author thus refers to the defendant sworn as a witness in a criminal cause:

“The case of an *accused* in a criminal trial, who *voluntarily takes the stand*, is *different*. Here his privilege has protected him from being asked even a single question, for the reason that *no relevant fact that could be inquired about would not tend to criminate him* (ante, Sec. 2260). On this very hypothesis, then, his *voluntary offer of testimony upon any fact is a waiver as to all other relevant facts because of the necessary connection between all*. His situation is distinct from that of the ordinary witness, with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come until later when some part of the criminating fact is asked for; while the accused has the choice at the outset.

* * *

Now the accused knows that there must always be such a connection; but in the witness case there may or may not be such a connection, and if there is not, then his answer cannot be a waiver. *The result is, then, that the accused, as to all facts whatever* (except those which merely impeach his credit and therefore are not related to the charge in issue) *has signified his waiver by the initial act of taking the stand.*”

Heldt v. State, 20 Neb. 492; 30 N. W. 626.

Subdivision 5 of the syllabus is in this language:

“If a person accused of crime testify in his own behalf, he is to be treated as any other witness; and if he fails to deny a material fact which has been testified against him, the district attorney may comment upon such omission in his argument to the jury.”

In the opinion (pp. 629-30) Mr. Chief Justice Maxwell uses this language:

“The plaintiff testified as a witness in his own behalf very fully, and denied making the alleged confession. He did not, however, deny that he had committed the offense with which he was charged. The district attorney, in his argument to the jury, commented upon this omission, and this is now assigned for error.

“This question was before this court in Comstock v. State, 14 Neb. 205 (S. C.) 15 N. W. Rep. 355, and it was held that when a prisoner testifies in his own behalf, and fails to contravert what has been said by witnesses against him concerning a fact within his own personal knowledge, it is in the nature of an admission of the truth of such fact. The failure to contradict such fact may, no doubt, be open to explanation. The general rule is that if the accused testifies as a witness he is to be treated as any other witness. Boyle v. State, 5 N. E. Rep. 203; Thomas v. State, 2 N. E. Rep. 808; Com. v. Nichols, 114 Mass. 285; State v. Ober, 52 N. H. 459, 13 Am. Rep. 88; Connors v. The People, 50 N. Y. 240. There was no error, therefore, in the comments of the district attorney’.”

See in this connection

Brandon v. The People, 42 N. Y. 265-9;

Lee v. State, 56 Ark. 4; 19 S. W. 16.

Subdivision 3 of the syllabus is in this language:

“Where defendant was sworn in his own behalf, though he confined his testimony to the single question of self-defense, he thereby became a witness in the case, and Act March 24, 1885, sec. 1, which provides that the failure of one charged of crime to testify in his own behalf shall not create a presumption against him, does not prevent the prosecuting attorney commenting on defendant’s failure to deny certain testimony in relation to facts of which he must have had knowledge.”

In the opinion of the Chief Justice, pages 16-17, S. W. Rep., the following discussion of the subject is found:

“The defendant testified in his own behalf, but confined his testimony to a single fact, tending to sustain his theory of self-defense. One of the attorneys for the prosecution, in his argument to the jury, commented upon the defendant’s failure to deny the testimony of two witnesses for the state, to the effect that he had made a statement the day of the homicide indicating a desire for an opportunity to kill the person for whose death he was upon trial. It is argued that this is prejudicial error, for which the judgment should be reversed. Acts 1885, p. 126. But the exemption from unfavorable comment upon the silence of a defendant in a criminal cause extends only to one who does not avail himself of the statutory privilege of testifying in his own behalf. If he takes the stand, he is upon the same footing as any other witness. McCoy v. State, 46 Ark. 141. When he has exercised his option to become a witness, he is made competent for all purposes in the case, and, as was said by the supreme court of Maryland in a case like this, ‘his conduct on the witness stand, and his silence

as to matters involved in the pending inquiry which were certainly within his knowledge, were circumstances which the jury had a right to consider in deciding upon the credit due to the witness, in connection with the other facts proved in the case, and they were therefore circumstances upon which the state's attorney had a right to comment in addressing the jury'. *Brashears v. State*, 58 Md. 568; *McFadden v. State*, 28 Tex. App. 241, 14 S. W. Rep. 128; *Heldt v. State*, 20 Neb. 492, 30 N. W. Rep. 626; *Foote v. People*, 56 N. Y. 321; *State v. Tatman*, 59 Iowa 472, 13 N. W. Rep. 632; *Com. v. Mullen*, 97 Mass. 546. The attorney's reference to the defendant's failure to contradict the witness does not warrant a reversal."

Thomas v. State, 103 Ind. 41; 2 N. E. 808.

It was held in that case, as shown by Subdivision 8 of the syllabus, that:

"A defendant who voluntarily takes the stand and broadly denies the crime, thus waives his constitutional privilege and may be cross-examined on all facts relevant and material to the issue."

Comstock v. State, 14 Neb. 205; 15 N. W. 355.

It was held in that case, as shown by Subdivision 6 of the syllabus, that:

"The fact that a prisoner does not testify on his own behalf would not operate to his disadvantage, but if he testify and fail to controvert in any way what has been said by witnesses against him concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true."

State v. Tatman, 59 Iowa 491; 13 N. W. 632.

“Upon the final trial, on the plea of not guilty, the defendant offered himself as a witness, and he was examined as to certain matters material to his defense. The district attorney, in his argument to the jury, commented upon the fact that the defendant testified to a part only of his defense, and omitted to testify upon other material facts in the case within his knowledge, and urged that such omission should be considered by the jury.

It is contended that because of this conduct of the district attorney the judgment should be reversed. Section 3636 of Miller's Code provides that defendants in criminal proceedings shall be competent witnesses in their own behalf; but if a defendant should elect not to become a witness, that fact shall not have any weight against him on the trial, and shall not be referred to by counsel for the state, and if counsel should do so, defendant shall be entitled to a new trial.

It is conceded that it was the right of the district attorney to comment on such testimony as the defendant gave; but it is urged that he had no right to comment upon the defendant's failure to testify as to matters regarding which he preferred to keep his mouth closed. *The exemption from unfavorable comment extends only to such defendants as choose not to avail themselves of the privilege of testifying in their own behalf. Here the defendant put himself upon the stand as a witness, and we can see no reason why the counsel for the state should not comment on his testimony as fully as on that of any other witness. By putting himself upon the stand, and testifying to material facts in his defense, the defendant waived the protection which the statute accords him.*”

State v. Grubb (decided by the Supreme Court of Mo. in 1906), 99 S. W. 1083.

We ask especial attention to the later Missouri cases because in the briefs of both plaintiffs in error, some earlier Missouri cases, which were entirely out of line with the general trend of American authority, have been cited to sustain their contention that neither trial judge nor counsel had a right to comment on the failure of the defendants, while on the stand, to testify as to certain incriminating matters already before the jury.

In that case a defendant had taken the stand as a witness on his own behalf. Prior to that time a certain witness on behalf of the state had testified that the defendant had got from him two horses at his stable in Steelville to get to another town called Sligo. *While on the stand, defendant had failed to testify at all as to the subject of the trip.* In the course of his argument the district attorney had said:

“Here is Herman Essman, a witness for the state. He knew Emory Grubb, and he says Emory Grubb got two horses from him at his stable in Steelville to go to Sligo. *It is a strange thing to me, gentlemen of the jury, that this Steelville trip has not been explained to you.*”

Defendant's counsel claimed that the misconduct of counsel in commenting on the silence of defendant as to the trip constituted reversible error.

“The testimony had shown that these two defendants appeared at the house of Mr. Par-

rott about sundown on the evening of the 6th of June, 1904, riding two horses, answering the description of Essman's horses, and driving cattle with the brands and marks of the cattle that were stolen from the Sligo pasture, and of the same colors and all dehorned, and it had been shown by Essman that the defendants in June had got two horses answering to the description of those ridden by the defendants that day, and to be used for three days, and were not returned until the morning of the third day. *To say that counsel for the state, with all these incriminating facts tending to show the theft of the cattle and the possession of them at sundown on the evening of the 6th of June by the defendants, should not be allowed to argue that these facts called for an explanation by the defendants of the time when they hired the horses from Essman, and the place to which they went, would be announcing the rule that counsel for the state are no longer permitted to make a logical argument and discuss incriminating facts to a jury, because of section 2638, Rev. St. 1899 (Ann. St. 1906, p. 1569), which provides: 'If the accused shall not avail himself or herself of his or her right to testify* * * * *it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by attorney in the case, nor be considered by the court or jury before whom the trial takes place.'* *That section, in our opinion, was never intended to prohibit, nor did it have the effect of prohibiting, a court having criminal jurisdiction from instructing a jury as to the presumption arising from the recent possession of stolen property, nor to deprive counsel for the state of arguing the effect of the failure by defendants charged with larceny to explain the possession of stolen property recently after it had been stolen. In our opinion, if Mr. Cope*

made the statement attributed to him, he did not violate the prohibition of the statute, but was *entirely within the scope of a legitimate discussion of the evidence in the case.*"

This recent Missouri case does not, in terms, repudiate or reverse the earlier Missouri decisions which we have said are counter to the general trend of American authority.

In view of the persistency with which the several cases decided by the Supreme Court of Missouri have been urged upon the attention of this court by plaintiff in error in the present case, and by Caminetti in his brief, we ask attention to some very recent adjudications made by the Supreme Court of Missouri. As before indicated by us, the Missouri decisions relied on by adverse counsel were out of line with the general trend of American authority on the subject. Since the government's brief in the Caminetti case was set up by the printer, two Missouri cases have come to our attention which were not cited in that brief. They are the cases of

State v. Raftery, 158 S. W. 585-8 (decided by the Supreme Court of Missouri June 28, 1913);

and

State v. Larkin, 157 S. W. 600-4 (decided by the Supreme Court of Missouri in May, 1913).

In the Raftery case the court said:

"This court has recently held in *State v. Larkin* that *counsel for the state has the right*

to comment on the failure of the defendant, while on the stand, to deny incriminating statements attributed to him by other witnesses. It is a wholesome rule, and we abide by it."

In the Larkin case the court said:

*"Defendants strenuously urge that the court erred in permitting the prosecuting attorney to comment upon the failure of defendant Roy Larkin who took the stand as a witness in his own behalf, to deny certain statements which the prosecuting attorney averred had been made by him to Mrs. Harris. * * * (p. 605.) We have carefully examined the statutes and holdings upon this question of more than thirty states, and we find that it has been held universally that, if the defendant is not sworn as a witness in his own behalf, any comment by the prosecuting attorney on his failure so to testify constitutes reversible error, in the absence of a peremptory and proper rebuke by the trial court. But, on the other hand, except in our own state and in California, where the question has been sometimes doubted, the right of the prosecuting attorney to comment upon the failure of the defendant, when he takes the stand as a witness in his own behalf, to deny or explain incriminating facts and statements, has been uniformly held allowable."*

The Missouri Supreme Court, in its opinion, calls attention to the following list of cases which, on examination, will be found to sustain the doctrine so clearly set forth in the opinion:

Solander v. State, 2 Colo. 56;

State v. Tatman, 59 Iowa 471; 13 N. W. 632;

Stover v. People, 56 N. Y. 315;

- Heldt v. State*, 20 Neb. 500; 30 N. W. 626; 57 Am. Rep. 835;
Comstock v. State, 14 Neb. 205; 15 N. W. 355;
State v. Staley, 14 Minn. 118 (Gil. 75);
Cotton v. State, 87 Ala. 103; 6 So. 372;
Clarke v. State, 87 Ala. 71; 6 So. 368;
Lee v. State, 56 Ark. 4; 19 S. W. 16;
McCoy v. State, 46 Ark. 141;
Brashears v. State, 58 Md. 567;
McFadden v. State, 28 Tex. App. 241; 14 S. W. 128;
Lienburger v. State (Tex. Cr. App.) 21 S. W. 603;
Parker v. State, 62 N. J. Law 801; 45 Atl. 1092;
State v. Harrington, 12 Nev. 125;
State v. Ulsemer, 24 Wash. 659; 64 Pac. 800;
Hanoff v. State, 37 Ohio St. 178; 41 Am. Rep. 496;
State v. Ober, 52 N. H. 459; 13 Am. Rep. 88;
State v. Glave, 51 Kan. 330; 33 Pac. 8;
Toops v. State, 92 Ind. 13;
Commonwealth v. McConnell, 162 Mass. 499; 39 N. E. 107.

The court, in its opinion, further discusses the subject in the following language:

“The rule that no reference shall be made to the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on in the event he does not become a witness in his own behalf is therefore, we find, universal; but, on the contrary,

the rule that if he does go upon the witness stand he then stands in the precise attitude of any other witness is, except in this state, and, as stated, in California, where the rule is subject to some doubt, also universal. Mr. Wharton in his learned and able work on Criminal Evidence lays down in the tenth edition thereof the rule that *such comment is allowable*; to this statement of the text he cites no exceptions, and correctly quotes the Missouri courts as entertaining like views. Wharton, Crim. Ev. (10th ed.) sec. 435a. * * * For many years, and in practically every jurisdiction in the American Union, it has been vehemently urged in perhaps more than a hundred cases that the right of the state to cross-examine a defendant who at his own request, and not otherwise, takes the stand as a witness in his own behalf, is *limited by the constitutional inhibition, against self-incrimination.* But, without citing cases, it may be said that *this question is now well settled against the contention urged.* The contention that, *absent a statute such as we have, cross-examination is limited by the constitutional rule against self-incrimination, has been exploded utterly on the ground that there is sufficient protection against self-incrimination when it is provided that a defendant may or may not testify for himself, according as he may desire.* * * *

(606) Nothing is clearer, when we consider the history of this legislation, when we consider that at common law the defendant could not testify in his own behalf, and that the two sections of our statute were intended to modify the common law, and when we consider the rule that *this modification of the common law ought to go no further in its construction than its terms expressly provided, than that there is no legal or statutory prohibition against comment by the prosecuting attorney in any case, if in fact the accused does avail himself of his right to testify.*

In logic and reason it is no argument against this view that the state by an express statutory provision is precluded from cross-examination of the defendant upon any matter other than that about which he shall himself testify in his examination in chief. * * * *Other states*, as we have seen, without having in their statutes the provision that a defendant testifying for himself 'may be contradicted and impeached as any other witness in the case', *have, yet with practical unanimity, held that, if a defendant avails himself of his right to testify, he then stands as any other witness, and his silence in explaining and his failure to deny or contradict incriminating facts, statements, or circumstances may be fully commented on by the prosecuting attorney.* It is our duty to construe our own statutes as we find them in the light of their language, intent, and logic. *There is no valid reason for the construction which has long been put by this court upon this provision of our statute. It is in absolute conflict with the rule announced by the text-writers and diametrically in conflict with the holdings of at least forty-six states in this Union on this identical question.* In Iowa, as has been noted, there is a statute making the prosecuting attorney guilty of a misdemeanor if he refers to the failure of the defendant to take the stand and testify in his own behalf, but if the defendant does take the stand, and does make himself a witness for himself, the right of comment upon the defendant's failure to deny, or contradict incriminating facts, statements or circumstances is left absolutely open to the state. *State v. Tatman, supra.* Time and again, ever since the rule announced in *State v. Graves, supra*, which is now criticised, was first enunciated, this question has been up for ruling. *It needlessly, and in the writer's view erroneously, reverses more cases than any other single point which we are*

called on to review. * * * For years subsequent to the rendition of the opinion in *State v. Graves*, supra, where the contrary doctrine to the one discussed here was first enunciated in this court, the cognate rule above referred to of *presumption arising as a matter of law from the failure of the defendant to deny incriminating facts or circumstances was fully recognized.* * * * (Citing cases.) * * * It is difficult to see why, if such a presumption is as a matter of law entertained against a defendant when he takes the stand as a witness in his own behalf, such presumption might not be commented on by the prosecuting attorney in a case where the defendant likewise becomes a witness in his own behalf. We concede that, if there were any restrictions whatever placed upon the defendant as to the nature or extent of his testimony when he has elected to become a witness for himself, then there would be some reason in the rule. But there is no such restriction upon him. *His right to explain, deny and contradict is as unlimited as the rules of evidence, and as broad as the issues pertinent to the matter under inquiry.* In order to reach this conclusion, we must perforce read into section 5243 words that have not been placed in that section by the Legislature. We must make the first clause of that section read: 'And if the accused shall not avail himself of his * * * right to testify, *on any question, point, fact or circumstance, then*' etc. When we consider that the statute in question changes the common law, *it is difficult to see our warrant for reading into this section words that the Legislature has not in express language placed therein.* We conclude that the case of *State v. Graves*, 95 Mo. 513, 8 S. W. 739, which enunciated the rule that no comment shall be made by the prosecuting attorney or other counsel for the state on the failure of the defendant to testify about or to

deny or contradict any statement, fact or circumstance in the case, as well as other cases in this state which announce the same rule, following the case of State v. Graves, ought to be overruled and no longer followed in this behalf."

At page 46 of their brief, counsel for plaintiff in error cite and quote from the case of *Williams v. United States*, 168 U. S.; 42 L. Ed. 509. Counsel claims the case is directly in point. An examination of the very language quoted by counsel, in our judgment, will show directly the reverse of the position taken by them. The case is not in point.

At page 47 they quote the following portion of the charge of the trial judge in the *Williams* case: "If in this case the defendant could have produced *testimony explaining his several deposits in the San Francisco Savings Union and the Hibernia Bank during the months of September, October, November and December, 1895, and has failed to produce such testimony, then you are at liberty to infer that any explanation in his power to make, would have been, if made, adverse and prejudicial to the defense.*"

We ask the court, in connection with this language, to look on the same page of the brief (47) at the language of the justice of the Supreme Court in passing on the correctness of the charge:

"The accused was entitled to stand on the presumption of his innocence and it cannot be said from anything in the present record that he was *under any obligation arising from*

the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offense imputed to him. In our judgment, the court, under the circumstances, disclosed error in not excluding the affidavit and bank books as evidence, as well as what defendant said to the jury on that subject."

That case certainly is very far from serving as any proper basis for the contention here made by counsel for plaintiff in error. The evidence as to which the trial judge directed the jury was *evidence which should not have been in the record*, and had no bearing on the question of his guilt or innocence. Naturally enough the trial judge had no right to instruct the jury that the defendant was under any obligation *to explain matters which had no proper or possible connection with the question of his guilt or innocence.*

Another decision from the Supreme Court of the United States, referred to in connection with this subject is *Davis v. United States*, 160 U. S. 469. Counsel cite and quote from this case at pages 60-1. In our judgment the matter there suggested is not pertinent to the question here under investigation. The matter there considered was the question whether a defendant relying on insanity as a defense, should establish such defense by a preponderance of the evidence. The Supreme Court very properly, and in line with the general trend of decisions on the subject, held that the general doctrine on the subject of reasonable doubt as

to the guilt of the defendant must govern the final determination of that question by the jury, and that if on the entire testimony covering the question of insanity, as well as other questions, the jury entertained a reasonable doubt as to defendant's guilt, the accused was entitled to the benefit of such doubt.

IV.

The Trial Court Committed no Error in Refusing to Give the Instructions Requested by Defendant to the Effect that Lola Norris and Marsha Warrington Were Accomplices and that Their Testimony Should be Received with Caution and Weighed and Scrutinized with Great Care by the Jury.

At pages 67-95 counsel for plaintiff in error argue that the court erred in refusing instructions on the subject of Lola Norris and Marsha Warrington being accomplices and on the manner in which their testimony should be received by the jury and weighed in arriving at their verdict. This same subject matter is discussed in Subdivision IV of Caminetti's opening brief at pages 147 to 169.

The same matter is treated by us in the government's brief filed in the Caminetti case in Subdivision V, at pages 90-112. We respectfully request this court to refer to the argument there made by us. The facts and the law involved in the Caminetti case are substantially identical with those involved in the case at bar.

The proposed instructions requested by Diggs, as those offered by Caminetti, were inapplicable to any issue in the cause.

Unless the proposed instructions were responsive to some phase of the controversy being tried by the court, the trial judge was justified in refusing to give any of them to the jury. At page 91 in our former brief we cite cases sustaining this proposition.

If the record in the present case is destitute of any evidence upon which the jury under appropriate instructions would be justified in reaching the conclusion that either Lola Norris or Marsha Warrington was an accomplice, the action of the lower court in refusing to give to the jury the requested instructions was not only eminently proper but the only course which it had the legal right to pursue.

The position of the government upon this question is that under no aspect of the case can it be successfully contended that under the evidence or the law, either Lola Norris or Marsha Warrington was or could be held to be an accomplice of Maury I. Diggs.

In the statement of the facts in the present case we have shown by the testimony of Diggs himself that for two weeks before the departure for Reno, he had been arguing with Marsha Warrington to induce her to leave Sacramento and go with him (Rec. 321). While in hiding in the Columbia Hotel

in Sacramento Diggs says that the two girls were invited to the Columbia Hotel to meet himself and Caminetti (Rec. 335). In speaking of the subject of their conversation he said: "It was in regard to our conditions."

At page 233 *Marsha Warrington shows how Diggs told her all the things that would happen to her if she did not go with him.* The same witness further shows at pages 233-4 how protracted argument was had at the Peerless restaurant on Saturday, March 8th, before the girls could be *coerced into a reluctant consent to accompany Diggs and Caminetti on the trip.*

The next afternoon when told by the girls that they had reconsidered the matter and withdrawn their consent, *Diggs forced the two girls again to consent,* after suggestions and arguments that *the wives of Diggs and Caminetti would bring actions resulting in the imprisonment of the girls and that warrants were to issue next day for their arrest* (Rec. 232). We have shown how the false suggestion was made about *impending scandalous publications in the Sacramento Bee,* and how it was said that *complaint had already been lodged with officials of the Juvenile Court to secure the arrest of the two girls.* Under conditions of this character was the final consent secured from Marsha Warrington and Lola Norris to accompany Diggs and Caminetti on their Reno trip. *Marsha Warrington was then in the highly nervous condition resulting from her pregnancy by Diggs.* As she said, at page 253 of

the record: "*I went willingly after I was scared into it.*"

Lola Norris at pages 265-269 shows how she likewise was subjected to cajolery, coercion, misrepresentation and intimidation and how, under those circumstances, she gave a consent which was several times recalled before actually entering upon the journey. Neither in fact nor in law were the girls accomplices in the violation of the White Slave Traffic Act by either Diggs or Caminetti.

In this connection see

People v. Stratton, 141 Cal. 604-6,
cited by us at pages 94-5 of our brief in the Caminetti case;

People v. Miller, 66 Cal. 468,
cited by us at page 96 of our former brief.

Greenwood v. State, (Okl.) 105 Pac. 371-3,
cited by us at page 96 of our former brief.

We ask attention here to the argument and authorities shown at pages 97-101 of our former brief, wherein we show that these girls were not accomplices for the reason that as the victims, willing or otherwise, of their transportation in interstate commerce, they could not nor could either of them, have been indicted, tried or punished under the provisions of the White Slave Traffic Act.

Even if they were accomplices, no error is shown in the refusal of instructions. Here, as in the Caminetti case, the jury acquitted on the counts of the indictment declaring on the persuasion, inducement

and enticement. The first two counts of the six in the indictment refer to the transportation of the two girls in interstate commerce. The third and fourth counts refer to the procurement of the tickets for the trip. The only counts of the indictment as to which any possible claim of accomplice could apply, were the fifth and sixth counts relating to the unlawful persuading, inducing or enticing. Since that feature of the case has been eliminated by the verdict, no prejudicial error is shown in the refusal of instruction, even if the girls, under any possible aspect of the testimony, could be regarded as accomplices. Furthermore, even if they were accomplices, failure to give cautionary instructions constituted no error. In this connection see the authorities cited in our brief in the Caminetti case at pages 107-110.

In addition to the cases there cited we ask attention to

People v. Solander, 2 Colo. 48-49.

The court there said:

“I have found no case in which the verdict being correct on the mere omission of the court to charge the jury as to the weight to be given to the testimony of an accomplice, has been held to be error for which a new trial could be granted. But if such is the rule where there is no testimony to corroborate the accomplice, and the text of Mr. Greenleaf certainly supports that view I think that it cannot be extended to a case in which the accomplice is supported by other testimony.

Of course, the California rule followed in the case of *People v. Coffey*, based on the statute forbidding conviction on the uncorroborated testimony of an accomplice, cited by both plaintiffs in error, has no application to the trial of an indictment in the federal court. The girls here were abundantly corroborated by many other witnesses in the case.

V.

The Only Issue Involved in the Indictment Against Diggs Certainly Did Not Escape the Attention of the Trial Judge.

At page 96 of their brief, counsel for Diggs in the third subdivision of their argument, use this heading:

“The only issue involved in the indictment escaped the attention of the trial court. This issue was also the only issue in evidence. The whole charge of the trial court to the jury was, for this reason misleading and erroneous and the jury was blinded as to the real issue. By reason of this, therefore, defendant failed to receive a fair and impartial trial.”

A discussion of this amazing proposition is carried on from pages 96 to 113. The argument presented in these pages in Subdivision III by counsel for plaintiff in error is identical in language with that shown in Subdivision XIV of Caminetti's brief, at pages 298 to 314. The argument in the Diggs brief is a perfect duplication of that in the Caminetti brief as to language and citation of au-

thorities, the only change being in the substitution of the names of the parties and the pages of the record involved in the rulings. The initial language of the argument in each brief is:

“The whole charge to the jury is pregnant with the above misconception indulged in by the trial court.

The court labored under the impression that the defendant was charged with the interstate transportation of the woman for the purpose of ‘debauchery’. The prosecution also misconceived the nature of the issue.”

The trial judge in the present case, as in the Caminetti case directly called the attention of the jurors to the language of the indictment and to the language of the statute under which the indictment had been found. We feel that the argument thus identically urged in both briefs may be met by us without duplication of our work and that of this court. In our judgment the position of counsel in this regard has been adequately met in Subdivision XV of our brief in the Caminetti case at pages 204 to 212.

The charge of Judge Van Fleet referring to the several counts of the indictment is shown at pages 371-377. In that portion of the charge, Judge Van Fleet defines the several terms “concubine”, “mistress”, “debauchery”, and their relation to the immoral purposes or practices denounced by the statute.

At pages 207-209 we showed by definitions from standard lexicographers that the terms, as defined

by Judge Van Fleet, were correctly defined by him.

At page 209 of our brief we quoted the language of Mr. Justice Harlan, shown in the case of *United States v. Bitty*, 208 U. S. 393-403; 52 Law Ed. 547.

We ask attention to a portion of the quotation from that opinion shown at pages 209-210 of our brief:

“We must hold that Congress intended by the words ‘for any other immoral purpose’ to include the case of any one who imported into the United States an alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable, or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute, the importation of an alien woman brought here that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.”

At page 210 of our brief in the Caminetti case we asked attention to the following language used by District Judge Foster of the Eastern District of Louisiana, in the case of *United States v. Flasboller*, 205 Fed. 1007:

“The indictment sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation and concubinage with accused. Certainly illicit cohabitation and concubinage are immoral acts analogous with prostitution, and

come well within the letter of the statute.
 * * * *In my opinion the case is on all fours with that of the United States v. Bitty, 208 U. S. 293, and interpretation of the statute must be controlled by that decision."*

The position of counsel in regard to this question in the present case, in our judgment, is fully met by the argument advanced by us in our former brief.

In this case, as in that, suggestion is made that the author of the White Slave Traffic Act had, in a report submitted to Congress, suggested that the case of *Bitty v. United States* had no bearing on the question here before the court.

This suggestion of counsel may be well met by the language of Mr. Justice Harlan in the *Bitty* case itself.

*"The intention of the Legislature is to be collected from the words they employ. * * * The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act in search of an intention which the words themselves did not suggest."* (See the opinion of Justice Harlan set out in our Caminetti brief at pages 61 and 66.)

A further answer is furnished in the language of Circuit Judge Baker, speaking for the U. S. Circuit Court of Appeals for the 7th Circuit, during the January session of 1914, in the case of the notorious Jack Johnson. The case is reported as *John Arthur Johnson v. United States of America*. The opinion in this case is set out in our Caminetti brief

at pages 66 et seq. At page 69 of our brief appears this language quoted from that opinion:

“Against upholding the conviction on the sexual intercourse counts defendant’s first insistence is that *the intention of Congress was otherwise*. By noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions; but *that has nothing to do with a judicial ascertainment of the meaning and constitutionality of the act when it was adopted*. Reference is made to public debates as indicative of the author’s intent. But the writer of a bill may explain his purpose to fellow members and they may vote for it solely because in their judgment it has a wider or narrower scope than he states. This is one of the considerations that ages ago led to the *universal canon of interpretation, that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.*”

For the purpose of sustaining their view as to the proper construction of the act counsel for plaintiff in error in this case, as in the Caminetti case, rely on certain language found at pages 6 and 7 of Report No. 47 on White Slave Traffic, filed December 21, 1909, at the second session of the 61st Congress. The language is as follows:

“Section 3 of the Act of February 20, 1907 (Immigration Act) has received the consideration of the Supreme Court in two cases.

In the first case, that of the United States v. John Bitty (208 U. S. 393) the Supreme Court

held that a foreign woman being brought to the United States as the personal private mistress of a man living here, was being imported '*for other immoral purposes*', and that thereafter the importer was subject to the penalty of the statute and the woman to deportation.

This decision is not pertinent to the phase of the subject under discussion and is mentioned only in passing."

What was the particular *phase* of the subject covered by the act which was *then under discussion*. Some enlightenment on this subject may be had from Part 2 of Report No. 47, being the report of the minority of the committee opposing the enactment of the proposed law. The report of that minority of the committee is signed by W. C. Adamson, William Richardson and C. L. Bartlett, and styled "Views of the Minority".

At page 3 of the minority report we find the following:

"Our chief objection to the bill is that under the exclusive authority that the Congress has under the Commerce Clause of the Constitution to regulate, direct and control commerce among the states and foreign nations, that incidentally or otherwise, Congress cannot, in the exercise of police power, punish citizens of the state for violating a federal statute made under the pretense of regulating commerce and suppressing evils, which in the strictest and most literal sense, along with the health, peace and order, is an affair that belongs to the states and the federal government never has and never can, under our existing federal system, lawfully claim or exercise such power, except in the District of Columbia and the territories."

The objection urged in this language was the peculiar phase of the subject under discussion with reference to which the majority report in referring to the case of *United States v. Bitty*, said:

“This decision is not pertinent to the phase of the subject under discussion and is mentioned only in passing.”

The majority of the committee entertained the view that the Bitty case determined nothing in this controversy. We respectfully submit that that judgment must give way and fall before the authoritative declarations made on the subject by the judicial branch of the government. It is hardly proper that on such fractional legislative authority we should be expected to overrule the decisions of the various federal courts that have passed upon this question.

VI.

There Is No Merit in the Claim of Undue Probative Importance Alleged by the Counsel for Plaintiff in Error to Have Been Attached by the Trial Court and Counsel for the Government in the Matter of the Blood-Stained Sheet.

At pages 114 to 137 of their argument they argue the proposition thus stated in Section 4 of their brief in this language:

“The undue probative importance placed by the prosecution and the trial judge upon the blood-stained sheet taken from the Reno cot-

tage distorted and influenced the minds of the jury to such an extent as to deprive defendant of a fair and impartial trial and also constituted *gross misconduct on the part of the prosecuting attorneys and the trial judge.*"

This matter, discussed with seeming seriousness, has taken unto itself an argumentative value or volume of twenty-four pages of print. We fear that we might deserve, if not invite, a real rebuke for real misconduct if we should pursue counsel for plaintiff in error through the twenty-four pages of print devoted to this subject. Life is too short,—the labor of the judges of this court too arduous for us thus to offend.

At page 134 counsel say:

"Although the record is silent, nevertheless to be charitable to the prosecuting attorneys" (small favors thankfully received) "it undoubtedly was the intention of the prosecution to *prove a seduced virgin*. But when the victim testified to the facts, the result was disastrous. The damage, however, was done, and the prosecution could not then undo the gross error."

Poor little Lola Norris, according to her uncontradicted story, became a "*seduced virgin*" only when Diggs had finally and firmly placed her in the embrace of the persistent Caminetti after months of endeavor and pursuit.

The charges of misconduct of counsel and court in the attachment by them of undue probative importance to the bloody sheet must fall for lack of any real worth.

VII.

The Charge of Misconduct of Counsel During Opening and Closing Arguments is Warranted Neither in Fact Nor in Law.

At pages 138 to 181 of Subdivision V of their argument, counsel for plaintiff in error urge that the counsel for the government were guilty of misconduct in making their opening and closing arguments. The government counsel afforded no just ground for this claim of misconduct so vehemently urged during the trial and here advanced with such volume of words.

A similar argument was advanced in Subdivision VI of the Caminetti brief, covering pages 207 to 248. The argument here is not absolutely identical in language. The argument here covers forty-four pages, while the other covers only forty-two. The authorities cited and relied on in both cases are largely the same.

At pages 142-3 of the Diggs brief counsel cite twenty cases of identical title in identical order as the same twenty are shown at page 213 of the Caminetti brief. The symmetry of presentation is so excellently executed that two incorrect citations of the Caminetti brief are duplicated in the Diggs case, the cases being *Collins v. State*, cited as being in 145 S. W. 1065, whereas no case of that title is reported in 145 S. W. The case referred to is in 148 S. W. 1065. The other of the two cases being *People v. Burke*, 145 Pac. 1065, a volume not yet published, the current volume number being 143.

The general subject of misconduct of counsel was discussed by us in the Caminetti case at pages 149-195. Much of the argument of counsel for defendants is directed not only at the openly claimed and much reiterated charge of misconduct of counsel, but also at the insinuated unfairness, impartiality, bias and prejudice of the trial judge. The claim is not warranted,—either in the case of the court or of counsel.

In our Caminetti brief we have cited many cases showing the absolute unworth of the pretense here made that defendants in these cases were victims of prejudicial error at the hands of government counsel or of the court. Whatever was referred to by counsel in the arguments, opening and closing, as facts or logical inferences from the testimony, had absolute foundation in the record. Whatever was urged upon the jury to influence their action or secure a verdict was within the legitimate range of argument or suggestion. In this connection see cases cited by us at pages 176-185 of our Caminetti brief and also the argument and authority submitted by us at pages 188-195 of that same brief.

**IF THERE WERE ANY MISCONDUCT OR REFERENCE TO EX-
TRANEOUS MATTER IN THE STATEMENT OF COUNSEL,
THE MATTER IS NOT IN SUCH SHAPE AS TO BE OPEN
TO REVIEW HERE.**

As to the facts warranting the verdicts against these two co-conspirators in the degradation and ruin of these two girls who stood at the threshold

of womanhood, no scintilla of doubt could abide in the mind of any sane juror of average intelligence, after hearing the testimony of the two girls and the many other witnesses who corroborated their testimony.

In this connection we again ask attention to the language of Judge Van Fleet in his charge shown at pages 382-3 of the record:

“While, as I have stated, it is the duty of the Court to declare the law, and that of the jury to be governed by it in their consideration of the evidence, it is, on the other hand, the province and right of the jury to pass upon the facts in the case and the credibility of the witnesses. With those functions the Court has nothing to do, other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and it is neither the province nor the disposition of the Court to intentionally interfere with that duty of the jury. *If, therefore, during the progress of this trial you have gathered any impression from anything which the Court may have uttered in your presence, as to the views or judgment of the Court on the question of the defendant's guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum of the evidence discloses; and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. Any evidence that during the course of the trial has been primarily admitted in evidence and thereafter withdrawn is out of the case for any purpose for your consideration. And in this connection, as re-*

quested by counsel for the defendant today during an incidental argument, I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical evidence which may have gone in before you."

In the same spirit of confining the jurors to matters properly in evidence before them, the court said at page 392:

"Perhaps I should again admonish you that to no extent must you permit yourselves to be influenced in your verdict by the fact that this case has attracted so much attention and given rise to so much controversy in the public press, the halls of Congress, and among the people, prior to this trial, by reason of certain incidents arising in its earlier history. Those facts are wholly extraneous to your inquiry or to mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice flowing therefrom to find reflection in your verdict."

Furthermore, if there were misconduct,—if there were prejudice,—if there were action by the court or counsel which, if properly presented to an appellate tribunal, might in any possible aspect afford a ground for reversal, plaintiff in error did not lay a proper foundation for presenting such question here for review by this appellate tribunal.

Judge Van Fleet, as we have seen at page 383, did, as requested by counsel, charge the jury as follows:

“And in this connection, as requested by counsel for the defendant today during an incidental argument, I should suggest to you, gentlemen, that the *statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witnesses stand, or in the way of exhibits or other physical evidence which may have gone in before you.*”

If, as to any of the matters relied on by plaintiff in error as constituting misconduct of counsel any other or further instruction or warning as to any such matter here urged as misconduct were desired, the time to secure the same was when, at the close of the long trial, Judge Van Fleet was giving the jury his final instructions to govern their deliberations. No such request was preferred. The record shows no warning suggested in the guise of a requested instruction proposed by counsel. In the absence of such request and an exception based on the refusal of such request, any possible claim of prejudicial misconduct is without legal foundation. The rule on this subject was quoted by us from *12 Cyc.*, 585, at page 161 of our former brief, as follows:

“Improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify a reversal *unless the court has been requested to instruct the jury to disregard them and has refused to do so.*”

Cases sustaining the rule thus stated in *Cyc.* are shown at pages 161 to 169 of our brief in the Caminetti case. We respectfully refer the court to that brief for a fair presentation of our views. In our judgment the argument there made adequately meets the contention of counsel for plaintiff in error in this case.

VIII.

Further Charges of Misconduct of Counsel Unwarranted.

At pages 182-195, in Subdivision VI of their brief, counsel argue the question thus stated on page 182:

“Misconduct of counsel for the prosecution during the trial, *permitted and condoned by the trial judge*, prejudiced defendant and his case to such an extent with the jury as to deprive him of a fair and impartial trial.”

The first matter of serious misconduct charged to counsel for the government and said to have been condoned by the trial judge, is the bloody sheet. It must be that its alliterative association with the bloody shirt of the days following our Civil War has suggested this subject as a means of stirring up what is here an unnecessary controversy.

The bloody sheet seems to counsel much more potent in argument than in probative value. It has received all the treatment at our hands that it deserves. It may well be burned, buried or otherwise

eliminated from any possible opportunity for future use.

Another alleged aggravated offense against forensic discretion and propriety, is aimed at Mr. Matt I. Sullivan, senior counsel for the government, at page 189. The gentlemen representing Mr. Diggs say:

“Still another *pure specimen of sharp practice* indulged in by both attorneys representing the United States, and which was *aggravated by the indulgence of the trial judge*, will be found at pages 355 to 357 of the record. The record there shows the following proceedings took place:

Mr. SULLIVAN. Q. Mr. Diggs, during the course of this trial and in the presence of the jury here, during the cross-examination of Miss Warrington, did you not repeatedly suggest to your counsel questions to be propounded to Miss Warrington, asking her if she did not at divers times have intercourse with you?”

This question, in our judgment, was one which legitimately might occur to any counsel conducting a cross-examination under the circumstances shown by the record. Certainly a defendant, under cases above called to the attention of the court, may be treated while on the stand in the same way as any other witness whose conduct or motives may be inquired into for the purpose of determining his credibility or the probative value of his testimony.

As a matter of fact, Diggs had prompted the question referred to by counsel in the question that he asked of Diggs while on the stand. The *seeming reluctance* of Diggs to make any statement while

on the stand as to *his intimate relations with Marsha Warrington* is shown at page 354 of the record.

He was asked:

“Q. And did you and Miss Warrington there have sexual intercourse?

A. I would rather not speak of the relation
* * * I would rather not speak of my relation with Miss Warrington.”

It was following this exhibition of simulated reluctance on the part of Diggs that counsel asked the question, the mere asking of which is claimed to constitute misconduct on the part of government counsel.

When testifying to the actual fact whether or not he had prompted his counsel to ask questions of Marsha Warrington on cross-examination, he testified as follows:

“Q. *Didn't you suggest that question to your counsel?*

A. Well, I suggested that to my counsel a long time before I came into the court room
* * * *that suggestion may have been made by me during the cross-examination of Miss Warrington. I don't remember. I won't say that I did not make the suggestion.*”

If it be the fact, as admitted by Diggs, that he did prompt the question,—if it be the fact, as it undoubtedly is, that the prompting of the question was manifest to the eye and ear of those who were in the court room, it is perfectly natural that counsel should assume in testing the conduct of the defendant as a witness on the stand that he had a

right to show that his seeming reluctance to answer questions when on cross-examination as to his relationship with Marsha Warrington was only affected, when as a matter of fact he had tried by his own suggestion to get Marsha Warrington, his victim, while under cross-examination, at his instance, to testify to the identical subject matter involved in the question which he showed a reluctance to answer.

The whole case showed that anything like a sense of delicacy was absolutely foreign to the nature of Maury I. Diggs. When he affected a reluctant hesitancy to disclosing by his own answer the actual relationship between him and this young woman, he belied his whole conduct during the trial and his whole history, as testified to, during the several months preceding the Reno trip. His very illicit relationship with the girl was the argument advanced by him to induce her to make the trip with himself and Caminetti.

The question asked by counsel cannot, by any possibility of argument, be distorted into misconduct of counsel which could afford a ground for reversal of the judgment here under attack.

In disposing of the matter at the time the trial judge made this remark as shown at page 356:

“The jury will understand that the argument of counsel, arising on an objection, is not evidence in the case and is not to be considered by the jury in determining the issues to be submitted to them.”

As we have shown, the court during his charge, fully covered this and any other matters which might have been excepted to as constituting misconduct of counsel. This subject has been sufficiently discussed, in our judgment, in the preceding pages and in our brief in the Caminetti case.

IX.

The Trial Court Committed no Error in Overruling the Objection to the Question Asked of the Witness Diggs as to What Was Meant by the Reno Trip.

At pages 196 to 200 in Subdivision VII of their argument, counsel for plaintiff in error argue the proposition thus stated:

“The trial court erred in compelling the defendant to testify to certain matters which are not the proper subject of cross-examination.”

Counsel apparently misconceive both the record and the law with reference to this matter. The matter here involved is not that of compelling a defendant standing on his privilege and refusing to incriminate himself to give an answer if silent on cross-examination. There was neither assertion of his privilege—if, under the law, he had any such privilege after waiving it by his voluntarily taking the stand—nor compulsory action by the trial judge. The record as quoted by counsel at pages 196-7 shows merely an objection that the challenged question was not cross-examination. In any event, in

no aspect of the case could the action of the court be prejudicial error. Apparently counsel make their bold assertion without due regard to the matters shown by the record. Both during the direct examination and the cross-examination, without objection, did Diggs speak of the Reno trip.

Diggs had met the girls and had a long conference in the afternoon, and by an appointment, a meeting was arranged for eight o'clock that evening at the Saddle Rock restaurant. At page 342 Diggs testified:

"In a few minutes, a little after eight o'clock, I believe, the girls showed up. * * * While we were in there Miss Warrington came. She did not have her grip. * * * I called a messenger up and sent him for the grip. * * * In the meantime Mr. Caminetti showed up on the scene. He was pretty much under the influence of liquor. He says, 'Well, what's doing?' I said, 'Well, I am going and the girls say they are going, too.' He says, 'Where are you going?' I said, 'I don't know. *Anything to get out of town for a while.*' He said, 'Well, I haven't got any money. I will go down town and get some.' Which he did. He went away and went down town and got some.

(343) *I got the full information of all the trains and also the cost of transportation between different places from Sacramento to various positions.*

(344) *The next train leaving town was 10:45, the eastbound train, and we all agreed to catch that train. I called Mr. Caminetti up on the telephone again—in the meantime he was down to O'Brien's saloon. He had left in the meantime and gone down town to get some money. He said he was going down to Joe*

O'Brien's to cash a check. I telephoned to him down there and I got hold of him or left word for him. * * * *I told him, I left word we were going to catch the 10:45 train.* He didn't show up for that train. Miss Warrington and I went over to the depot. When the train got ready to go I thoroughly made up my mind * * * that I didn't care who went or who was ready to go or anything else. If the crowd wasn't ready to go I was going along. I was going to get out of town. Mr. Caminetti did not appear. * * * Miss Warrington walked over to the Southern Pacific station with me and the train stopped. We were contemplating about taking it. * * * I was contemplating in my own mind whether to take the train or not. * * * Then we went back to the restaurant.

(345) Before we went to the restaurant we sat in a little carhouse and waited a few minutes and thought that Mr. Caminetti might come along."

The 10:45 train was an eastbound train which passed Reno.

All the testimony above elicited from Diggs in connection with taking the eastbound train was on direct examination. On cross-examination, without objection, he testified as follows:

(347) "I met Miss Warrington and Miss Norris frequently the first week immediately *preceding our trip to Reno.*"

At page 348, likewise without objection, he said:

"We left for Reno two weeks after meeting her on the levee."

This meeting on the levee was the one at which he first discussed with Marsha Warrington the desirability of leaving Sacramento.

At page 16, referring to a discussion with Marsha Warrington, he said:

"I believe that was one week before we left for Reno on a Sunday night."

(352) *"They knew during the time we were discussing our contemplated departure from Sacramento that Mr. Caminetti was a married man living with his wife and had two children, the youngest one about three weeks old."*

At page 357 Diggs further testified without objection:

*"That night we went to Reno. Miss Warrington, Miss Norris and I left the Saddle Rock restaurant about 10 or 10:20. The first train going out for Reno was 10:45, which we intended to take had Mr. Caminetti been there. * * * I knew the 10:45 was an eastern train but I didn't know whether it went to Denver, Salt Lake, or where it went, but I intended to take it anyway. Caminetti didn't show up in time for that train. We went back to the restaurant. I met him just as we were coming out of the restaurant the last time that night. He gave Miss Norris some money, I don't know how much. I believe she was in the restaurant when he gave it to her—in the Saddle Rock restaurant—and after meeting Mr. Caminetti the four of us proceeded to the train."*

After all this testimony had been given by Diggs in response to questions of his own counsel and on cross-examination, without any objection by his counsel, this question was asked:

(358) *"Q. In your testimony you have referred repeatedly to conversations and conferences that took place before the Reno trip. Now, what did you understand or mean by the Reno trip?"*

His answer to that question was:

“A. *It is perfectly evident what trip it was.*”

In view of this condition of the record, it is amazing that the counsel for this very defendant witness should take the position that the harmless question asked as just above shown was not proper cross-examination or that any claim of error could be based on the ruling of the trial court allowing it. Yet, at page 197, counsel say the defendant in his direct examination *had not testified to any matter in relation to the alleged trip to Reno.*

It would be well for counsel, in making a statement as boldly as that, to have spoken with better knowledge of the record.

X.

The Court Committed no Error in Curtailing and Limiting the Examination of the Jurors.

At pages 201-210 defendant's counsel argue the proposition thus stated:

“Defendant was entitled to an examination of the talesmen which would have permitted intelligent use of his peremptory challenges. The denial of such right by the trial court in this case constitutes reversible error, defendant having thereby been deprived of a fair and impartial trial.”

The criticism of the rulings of the trial judge in the matter of the examination of jurors is as un-

warranted as the covert attack on the fairness and impartiality of the trial judge made in connection therewith.

The opening sentence of the argument on this proposition is as follows:

“Under separate assignments of error in this brief, we show misconceptions of the case indulged by the trial court.”

At page 205 counsel say further:

“Counsel well knew that the evidence would disclose gross immoral conduct of the defendant, but that such conduct would not amount to an infraction of the statute under which the defendant had been indicted. Defendant in such case was entitled to be tried by a jury composed of men broad-minded enough to perceive the distinction.”

The evident purpose of counsel in the examination of the jurors was to develop in their minds the feeling entertained by counsel as to the supposed misconceptions on the part of the court of the law involved in the case on trial. The attitude of the judge towards a proper examination for the purpose of testing the mind of the juror Bloch is shown by the language quoted by counsel at page 203:

“You can ask the juror if he will obey the instructions of the court and abide by the evidence. In other words, if there are any elements in his mind that would preclude him from answering the question to that effect, you may ascertain that.”

Of course the record does not purport to give all the questions asked and answered in the case of

Juror Bloch or in the case of any other of the jurors. The fullest latitude was allowed during the examination of the jurors for the purpose of establishing whether or not any bias or prejudice existed which would prevent their giving to the defendant a fair trial. The refusal to allow the question quoted at page 204 was evidently justified on the ground stated on the same page:

“We submit that he has already answered that substantially.”

The COURT. *Yes, he has. I do not see the necessity of repeating things of that kind. It does not add anything to it. The jurors are intelligent men and they ordinarily mean what is imported by their answer. He has already told you that they would obey the instructions of the Court and would be governed by the evidence in the case. Refrain from repetition.”*

The authorities cited by counsel to support their position afford no warrant for the criticism of the action of the trial judge in limiting the extent of the examination for the purpose of interposing peremptory challenges. The case of *State v. Steeves*, is in no way pertinent to the matter here under consideration.

The third syllabus is as follows:

“The separate trial of a defendant jointly indicted for murder on the theory that he was an accessory before the fact, his co-defendant having been convicted, it is error to permit him to interrogate jurors as to their opinion of his co-defendant’s guilt so as to enable him to intelligently use his peremptory challenge.”

This language indicates the closest connection the Steeves case has with the Diggs case.

No question of that character is presented here, and that is the only ruling in the case which seems to have any bearing at all on the matter herein discussed.

In speaking of the examination of talesmen for the purpose of peremptory challenge, *24 Cyc.*, 339, the authority quoted by counsel says:

“The nature and extent of this examination must be left largely to the discretion of the trial court, which will not be interfered with unless clearly abused.”

In the case of the juror Woolsey to whom counsel desired to put questions which had been asked of the juror Porcher, the court evidently acted within the proper range of its discretion. In the case of jurors Porcher and Woolsey, very full examination had been allowed in the regular course when the names of the jurors were first regularly called for examination individually. Some time after the conclusion of the examination of Porcher, defendant's counsel asked liberty of the court to ask a question which had not been asked during the regular examination of that juror. In the case of Porcher the court allowed the question. The examination of the jurors, as we have said, occupied a great deal of the time of the court and counsel. Long after the examination of the juror Woolsey, which had been very full and which had been completed, defendant's counsel sought to reopen his examina-

tion for the purpose of asking the same questions that had been asked of the witness Porcher with reference to former service as a juror within the district within a year. Counsel claim that they should have been allowed to reopen the examination of Woolsey on the ground that the court had already allowed them to reopen the examination of the witness Porcher. Similarly they might have requested the court to reopen the examination of every one of the thirty-six jurors who had been examined before the jury was finally completed. In each case they were allowed to complete their examination of an individual juror before taking up the examination of any other juror whose qualifications were to be passed on. The matter of reopening at the mere caprice of the defendant the completed examination of a juror is a matter which certainly must be within the control of the judicial discretion. In this case there appears to have been no abuse of such discretion. If counsel desired to urge the objection that the juror Woolsey had served as a trial juror within a year, the time for him to do it was when Woolsey was under examination for the purpose of determining whether defendant could exercise either a challenge for cause or a peremptory challenge. Having failed at the proper time to urge the objection they should not be allowed to claim that the court exceeded its judicial discretion in refusing to reopen the examination.

XI.

The Trial Court Committed no Error in Refusing the Requested Instruction as to Influence Exerted on Marsha Warrington or Immunity Promised.

In Subdivision IX of their brief, at pages 211-212, counsel for plaintiff in error argue that the trial court committed error in refusing an instruction set out by them at page 211. By the proposed instruction the jury were directed, in weighing the testimony of Marsha Warrington, to consider whether she might be under the influence of any persons or under promise of immunity. The instruction was not proper or pertinent to any issue based on the testimony. Counsel for Diggs point to no testimony in the record supporting any claim of improper influence or promised immunity. The testimony of the record conclusively establishes the contrary. See testimony of Marsha Warrington set out at page 255 of the record.

XII.

No Error Was Committed by the Court in the Refusal of Requested Instructions—That Suspicion Was Not Proof—and That the Rule in Criminal Cases Differed From the Rule in Civil Cases.

At page 213 plaintiff in error, through his counsel, claims that the refusal to give two requested instructions shown on that page was error.

The first recites that suspicion is not proof and that guilt must be established beyond reasonable doubt. The other calls attention to the distinction between civil and criminal cases as to proof by mere preponderance or beyond reasonable doubt. The court had no occasion to instruct as to civil cases. The rule as to criminal cases was fully and correctly stated in the charge and with extreme regard to the defendant's rights.

XIII.

The Court Committed no Error in Refusing Instructions Quoted Under Points XI and XII of Defendant's Brief at Pages 215 to 242.

These two subdivisions of their argument relate entirely to instructions therein set out and the alleged error of the court in their refusal.

The instructions set out in Subdivision XI at pages 215 to 219 refer to the rule proper to be stated in cases of circumstantial evidence and the rule proper to be stated to a jury on the subject of reasonable doubt. The proper instructions were given by the judge as to both of these matters. See the portion of the charge in the record at pages 380 to 382.

The discussion by the defendant's counsel in Subdivision XII of their brief refers to the refusal of requested instructions on the subject of the specific intent denounced by the White Slave Traffic Act.

The matter of specific intent denounced by the statute was clearly and fully called to the attention of the jurors by the trial judge. The portion of his charge bearing on this question is shown at pages 371, 372, 374, 375, 378 and 379. That portion of his charge has been set out in the preceding pages of this brief. The instructions shown in this subdivision of their argument were based largely on the erroneous views of defendant's counsel as to the true intent and meaning of the White Slave Traffic Act and in consequence were erroneous and improper.

One instruction as shown at pages 225-226 of their brief may be taken as an exemplar of the vice found in their requested instructions, the refusal of which is relied on here as error:

“Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reasonable doubt that he did them, that there existed in his mind the purpose and intent that the said Marsha Warrington should become the mistress and concubine of the said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Marsha Warrington, of *concubinage, which is a natural marriage*, as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continuous illicit cohabitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of

the acts alleged in the indictment, you must find a verdict of acquittal."

The instruction quoted shows that among other delusions entertained by the counsel for plaintiff in error one was that *concubinage was a sort of marriage*. It is hardly necessary to argue to this court that the views entertained by counsel in this regard find no recognition in the law of marriage as recognized and administered in the courts of the United States. Concubinage is certainly not marriage and especially not in the case of men with wives and children still living, from whom their relations have never by any proper action been severed. The ancient doctrine that a man might procreate children by a woman not his wife, who would not be regarded as bastards but still could not inherit from him, has never been recognized as part of the American law of marriage.

An examination of each of the other instructions set out in this section of their brief will show that whatever was proper in them to be given to the jury for their guidance as law, was clearly, correctly and fully stated by the trial judge in his charge. We will not prolong this argument by reciting here those portions of the charge bearing on the matters under consideration. The charge itself, so far as requisite for a proper understanding of the questions presented, has been sufficiently set out in preceding pages. The law proper to be stated by the trial judge to the jury has been suffi-

ciently discussed in other subdivisions of this argument.

XIV.

The Instruction of the Trial Court that the Evidence Before the Jurors, if Believed, was Sufficient to Warrant Conviction was Correct.

At pages 248-249 plaintiff in error, through his counsel, claims that the trial court erred in its instruction to the jury, contained in the following language:

“The evidence introduced before you by the government, if believed by you, is sufficient in legal effect, that is, in law, to sustain the conviction of the defendant upon each one of the several counts of the indictment, but *whether it is such as to satisfy you of its truth and establish the guilt of the defendant to the degree I have indicated, is, as I have heretofore stated, a question solely for your consideration.*”

It was clearly within the function of the trial judge to state that the evidence offered, if believed, was sufficient to warrant a conviction. He had as much right to pass on a question at the close of the testimony as he had to pass on a question of law involved by a demurrer to the indictment which presented the identical state of facts.

As to the matters properly within the jurisdiction of the jurors, those he clearly and definitely left to them for consideration.

Judge Van Fleet in the language quoted did not state to the jury that "in his opinion it was the duty of the jurors to convict". Therefore, we fail to see for what reason the action of the court in *Breece v. United States*, is called to the attention of this tribunal.

What the case of Becker, the New York policeman, has to do with the proper interpretation of the White Slave Traffic Act before this tribunal is not manifest to us. Its repeated suggestion to the court in this brief and the companion brief in the Caminetti case, and the repetition in various connection of the language used by the New York Court of Appeals, would seem to subserve only one purpose: as part of a concerted scheme to discredit the trial judge in the estimation of this appellate tribunal. Judge Van Fleet is not on trial. He needs no vindication at our hands. His clear conception of the facts and his absolutely correct declaration of the law, as shown in the rulings on the evidence and his directions to the jury, are perfectly manifest in the record before this court.

XV.

Refusal to Transfer Cause to Sacramento for Trial.

In Subdivision XIV of their brief, adverse counsel discuss the proposition thus stated at page 250:

"The court erred in not granting the motion made on behalf of the defendant at the outset of the case to transfer the trial of the cause to

Sacramento, where the offenses were charged in the indictment to have occurred, and where the defendant and the principal witnesses all resided.”

This is the identical question presented as Point XXXIV in the Caminetti brief at pages 383 to 389. The claim made has no merit. Neither Sec. 72 of the Judicial Code nor the case of *People v. Powell*, 87 Cal. 348, affords any warrant for the claim made by counsel in this connection. The argument and the authority in the Diggs case and the Caminetti case are identical. The matter in our judgment is sufficiently disposed of by us in the reply to the Caminetti brief at pages.....to.....

XVI.

The Enactment of the White Slave Traffic Act was a Legitimate Exercise of the Legislative Power of Congress Under the Constitution of the United States.

At pages 258-260 counsel argue the proposition thus stated: “The Act of Congress of June 25, 1910 (36 Stats. 825), designated as the ‘White-Slave Traffic Act’, is unconstitutional.” This contention is sufficiently met by the cases counsel mention on page 258 of their argument.

Hoke v. United States, 227 U. S. 308;

Athanasaw v. United States, 227 U. S. 326;

Bennett v. United States, 227 U. S. 333;

Harris v. United States, 227 U. S. 340.

In this connection see also:

United States v. Bitty, 208 U. S. 393; 52 L. Ed. 543;

John Arthur Johnson v. United States,
(U. S. Circuit Ct. of Appeals, 7th Circuit,
January Session 1914) 215 Fed. 679;

U. S. v. Flasblower, 205 Fed. 1007;

Wilson v. United States, 34 Sup. Ct. Rep. 347;

Weddel v. United States, (C. C. A.), 8th Circuit, March 30, 1914) 213 Fed. 208;

Latham v. United States, (C. C. A., 5th Circuit, January 25, 1914) 210 Fed. 159;

Kalen v. United States, (C. C. A., 9th Circuit, May 6, 1912) 196 Fed. 888;

Siniscalchi v. Thomas, 195 Fed. 701;

United States v. Westman, (decided by Wolverton, District Judge, Oregon District) 182 Fed. 1017;

Bennett v. United States, 194 Fed. 630;

United States v. Hoke, 187 Fed. 992.

In this connection the court is respectfully requested to refer to the argument of this question found in our brief in the Caminetti case, Subdivision III, at pages 44 to 73.

XVII.

**There is no Merit in the Point that the Immorality De-
nounced by the White Slave Traffic Act is Only
Commercialized or Commercial Vice.**

In Subdivision XVI of their brief, at pages 261

to 331 of their argument, counsel argue the proposition thus stated:

“The trial court erred in not holding that the facts proved by the prosecution, assuming them to be true, did not constitute such an offense as was intended by Congress to be prosecuted by virtue of the act known as the ‘White Slave Traffic Act,’ nor does the prevention and punishment of the things proven fall within the scope of the purpose for which that act was intended and which the defendant is charged with having violated, in that there was no evidence to show that the defendant profited by or expected to or intended to profit in or share in any profit ensuing or arising in pursuance of the transportation set out in the first count of the indictment, upon which defendant was convicted.”

The argument shown at these pages of the brief of plaintiff in error in the present case is the identical argument advanced in the same language and with citation of the same authorities as that found in Subdivision II of the opening brief of defendant Caminetti in the case numbered 2405. The identical argument there presented is, in our judgment, covered by the argument and citations made by us in Subdivision III of our brief in the Caminetti case at pages 44 to 73. Counsel, however, attempt to distinguish between commercialized vice as displayed in the case of a woman taken to a neighboring state for the purpose of prostitution, and vice manifested in taking a woman to another state for debauchery and immoral purposes, and for having her live with the person causing her

transportation as his concubine or mistress. The language of the White Slave Traffic Act affords no ground for any such distinction.

In our former brief we called attention to the case of

United States v. Bitty, 208 U. S. 393; 52 L. Ed. 543.

That was an appeal from the action of the lower court reported in 155 Fed. 938.

The position taken by counsel for the accused in these two cases is identical with the position taken by District Judge Hough of the Circuit Court for the Southern District of New York, when he announced his decision on December 10, 1907. The act there involved was not the so-called White Slave Traffic Act, but the Immigration Law. At pages 939-940 (155 Fed.) the judge used this language:

“It may be that, as the court remarked in the case cited, this defendant is guilty of an open violation of the divine law and of grossly immoral acts, so that such a case is not ‘the most favorable for a dispassionate consideration of questions of law, the decision of which involves the question whether the party defendant shall be punished, or discharged as not guilty of any offense cognizable by the statute’. It is, however, necessary to apply to this statute, as to any other, the ordinary rules of construction, concerning which the discussion at bar has not revealed any substantial difference of opinion between opposing counsel.

It may be admitted that the immigration act of 1907 is in its general scheme remedial; and

it is not denied that it is the duty of the court to give to each intelligible word of the statute its exact and precise meaning according to common understanding of the intent of the Legislature, so far as ascertainable from legal sources; and that intent, if expressed in apt language, must be enforced as long as the statute is in operation, though the result be cruel or ridiculous. So far as this statute is concerned I have been directed to no indication of legislative intent other than the language of the statute itself, except the report of the committee of the House of Representatives on immigration, made to the Fifty-ninth Congress at its first session (No. 4,912), wherein it is stated that the scope of section 3 of this statute is extended beyond that of the corresponding section of the act of 1903, 'so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up'. This I take to mean that the words 'or for any other immoral purpose' have been added to the word 'prostitution', in order to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes. Upon general principles the added words must be understood as meaning 'for any other like immoral purpose', so that the question becomes this: whether a man who brings his mistress into this country is committing an act ejusdem generis with bringing in a prostitute.

Concubinage is the act upon the part of the woman who is cohabiting with a man without ceremonial marriage, or consent and intent good at common law. A discussion of the difference between this status and that of the prostitute would be both needless and nauseating. It suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be

included by general words in a statute directed against the latter unfortunate class."

The view of the circuit judge was not adopted by the Supreme Court of the United States when its opinion was announced by Mr. Justice Harlan, as follows:

"This is a criminal prosecution under an act of Congress regulating the immigration by aliens into the United States.

By the act of March 3d, 1875, chap. 141, relating to immigration, it was made a felony, punishable by imprisonment not exceeding five years and by fine not exceeding \$5000, for any one knowingly and wilfully to import or to cause the importation of women into the United States for the purposes of 'prostitution'. 18 Stat. at L. 477, U. S. Comp. Stat. 1901, p. 1285.

By the act of March 3d, 1903, chap. 1012, it was provided: 'That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years, and pay a fine not exceeding five thousand dollars.' 32 Stat. at L. 1213, 1214.

A more comprehensive statute regulating the immigration of aliens into the United States was passed on February 20th, 1907. By that act the prior act of 1903 (except one section) was repealed. The 3d section of this last statute was in these words: 'That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other

immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and, on conviction thereof, be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act.' 34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389.

The defendant in error, Bitty, was charged by indictment in the circuit court of the United States for the southern district of New York with the offense of having unlawfully, wilfully, and feloniously imported into the United States from England a certain named alien woman for '*an immoral purpose*', namely, '*that she should live with him as his concubine*'.

* * * * *

We come now to the merits of the case, and they are within a very narrow compass. The earlier statutes, we have seen, were directed against the importation into this country of alien women for the purposes of prostitution.

But the last statute, on which the indictment rests, is, we have seen, directed against the importation of an alien woman 'for the purpose of prostitution *or for any other immoral purpose*'; and the indictment distinctly charges that the defendant imported the alien woman in question '*that she should live with him as his concubine*'; that is, in illicit intercourse, not under the sanction of a valid or legal marriage. Was that an immoral purpose within the meaning of the statute? The circuit court held, in effect, that it was not, the bringing of an alien woman into the United States that she may live with the person importing her as his concubine not being, in its opinion, an act *ejusdem generis* with the bringing of such a woman to this country for the purposes of 'prostitution'. Was that a sound construction of the statute?

All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution'. It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement'. *Murphy v. Ramsey*, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747, 764. Congress, no doubt, proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people.

Therefore the importation of alien women for purposes of prostitution was forbidden and made a crime against the United States. *Now, the addition in the last statute of the words, 'or for any other immoral purpose', after the word 'prostitution', must have been made for some practical object.* Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for the purposes of 'prostitution'. In forbidding the importation of alien women 'for any other immoral purpose', Congress evidently thought that there were purposes in connection with the importation of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland, Stat. Constr. Sec. 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute, may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that, in using the words 'or for any other immoral purposes', Congress had reference to the views commonly

entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons. Chief Justice Marshall, speaking for the court, said that 'though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has used them, would comprehend. *The intention of the legislature is to be collected from the words they employ.* * * * The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.' *United States v. Wiltberger*, 5 Wheat. 76, 95, 96, 5 L. ed. 37, 42, 43. In *United States v. Winn*, 3 Sumn. 209, 211, Fed. Cas. No. 16, 740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature'. To the same effect are *United States v. Morris*, 14 Pet. 464, 10 L. ed. 543; *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. ed. 450, 453; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; *Sedgw. Stat. & Const. Law*, 2d ed. 282; *Maxwell, Interpretation of Statutes*, 2d ed. 318; Guided by these considerations and rules we must hold that Congress intended by the words 'or for any other immoral purpose', to include the case of

any one who imported into the United States an alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.

The judgment must be reversed, and the case remanded with directions to set aside the order dismissing the indictment and overrule the demurrer, and for such further proceedings as will be consistent with this opinion."

A still more recent case bearing on this same subject of commercial or commercialized vice, is that of *John Arthur Johnson v. United States of America*, determined by the U. S. Circuit Court of Appeals for the Seventh Circuit, January Session, 1914.

The accused in that case was the notorious pugilist and profligate Jack Johnson. The opinion of the Circuit Court of Appeals is by Baker, Circuit Judge.

The following is found in the opinion:

"Plaintiff in error, defendant below, was convicted of violating the White Slave Traffic Act, which makes it a felony for any one knowingly to 'transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, any woman or girl for the purpose

of prostitution or debauchery or any other immoral purpose'.

One group of counts on which defendant was held charged that he procured the transportation of a girl from Pittsburgh to Chicago for the immoral purpose of having sexual intercourse with her. In another group the purpose laid was prostitution.

Respecting the first group the evidence showed that the girl, in financial straits at Pittsburgh, endeavored to reach defendant by long distance telephone; that an employee of defendant answered, and to him she told her plight; that the next day she received a telegram, signed 'Jack', asking what she needed for expenses; that in reply to her answer she received a telegram reading, 'I am sending you \$75. Go to Chicago at Graham's and wait until I get there. Jack'; that she drew the \$75 from the Postal Telegraph Company, purchased therefrom a ticket to Chicago, and traveled to that city on the Pennsylvania railroad; and that defendant shortly thereafter had sexual intercourse with this girl in Chicago.

No direct evidence was adduced to establish the authenticity of the telegrams. But from defendant's statement on the witness stand that he would not say that he had or had not sent them, from the fact that defendant on his arrival in Chicago called the girl by telephone at Graham's, and from the fact as testified to by the girl that defendant at their first meeting inquired, 'Did you receive the \$75 I sent you?' the jury were warranted in finding that defendant was the author of the messages and the furnisher of the money for the girl's transportation.

On the evidence thus far cited, a suspicion might be entertained that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that

defendant had no sexual intent at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped. But the record further establishes that before aiding this girl defendant habitually indulged in promiscuous sexual intercourse; that this girl was a prostitute; that defendant first met her several years before in a brothel; that throughout the period of their acquaintance they maintained sexual relations; and that frequently in his journeys about the country took the girl with him or had her travel to meet him, and always for the purpose of sexual intercourse. This additional evidence furnished a basis from which the jury could justifiably draw the inference of fact that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeit when the evidence shows that prior to the act in question he had habitually or frequently passed other similar counterfeits.

But a different situation affects the prostitution count. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion. And there were no supplementary facts like those that support the sexual intercourse counts—no proof that defendant had ever been connected with or interested in brothels or that prior to the act in Chi-

eago he had ever aided this or any other girl to engage in prostitution.

Against upholding the conviction on the sexual intercourse counts defendant's first insistence is that the intention of Congress was otherwise. By noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions; but that has nothing to do with a judicial ascertainment of the meaning and constitutionality of the act when it was adopted. Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to fellow members and they may vote for it solely because in their judgment it has a wider or narrower scope than he states. This is one of the considerations that ages ago led to the universal primary canon of interpretation, that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.

A further urge is that the words 'prostitution or debauchery or other immoral purpose' do not cover sexual intercourse that is merely unlawful. 'Other immoral purpose' are words of such generality that a criminal conviction thereunder could not be tolerated for acts whose purpose was any and every sort of immorality. They must be limited to that genus of which the preceding descriptions are species. Defendant contends that the nexus, the attribute in common, is 'commercialized vice',— that a defendant cannot be guilty unless it be shown that he is financially concerned in 'the traffic in women'. Prostitution, the first species, involves the financial element. But there is no condition in the statute that the furnisher of transporta-

tion shall be guiltless unless he shares or somehow profits by the hire of the woman's body. And in Hoke's Case, 227 U. S. 308, a conviction for transporting a woman 'for the purpose of prostitution' was upheld without proof that the woman was a 'white slave', an article of barter in 'the traffic in women' or that the defendant was interested in her earnings. Debauchery, the other named species, is restricted by its association with the first species to sexual debauchery, a leading of a chaste girl into unchastity. No financial element is necessarily involved in sexual debauchery; the statute introduces no such condition; And Athanasaw's Case, 227 U. S. 326, teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher or that he expected to profit by the girl's hire if she should become a prostitute. So it becomes apparent that 'commercialized vice' or 'the traffic in women for gain' is not the common ground; that the nexus indicative of the genus is sexual immorality; and that fornication and adultery are species of that genus. This conclusion is fortified by U. S. v. Bitty, 208 U. S. 393, where in construing the prohibition of the immigration act against the importation of alien women 'for the purpose of prostitution or any other immoral purpose' the latter phrase was held to mean unlawful sexual intercourse regardless of financial considerations. See also U. S. v. Flaspoller, 209 Fed. 1006, in reference to the White Slave Traffic Act.

Lawful power in Congress to pass an act of this scope is challenged. There was a time when it would have been interesting to examine the contention that the word 'commerce' in the Commerce Clause of the Constitution means only 'traffic in or an exchange of commodities'. But

when the ultimate tribunal long ago definitely decided that the term also includes 'navigation and intercourse', that 'transportation of persons' in and of itself is 'commerce', and that 'commerce' may not only be 'regulated' but actually prohibited in the interest of the general welfare, no room was left for profitable discussion. Passenger Cases, 7 How. 283; Gloucester Ferry Case, 114 U. S. 196; Rahrer's Case, 140 U. S. 545; Covington Bridge Case, 154 U. S. 204; Addyston Pipe Case, 175 U. S. 226; Lottery Case, 188 U. S. 321; Hoke's and Athanasaw's Cases, *supra*. Whole ranges of acts, like those regulating carriers, safety appliances, employers' liability for injuries to interstate trainmen, hours of dispatchers' work, twenty-eight hour confinement to live stock, movements of diseased persons or animals, pure food, etc., are upheld only on the basis that 'transportation is commerce'. Nothing remains but to say that the present act obviously is concerned with the interstate transportation of persons. How far and with what governmental purposes the undoubted power shall be exercised must be determined by the legislature, not the judicial, department of government."

The law was sustained in a decision by District Judge Foster of the Eastern District of Louisiana, in *United States v. Flasboller*, 205 Fed. 1007.

The court there said:

"The indictment sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation, and concubinage with the accused. Certainly illicit cohabitation and concubinage are immoral acts analogous to prostitution, and come well within the letter of the statute.

The White Slave Act has been held to be constitutional (see *Hoke and Economides v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed., decided by the Supreme Court February 24, 1913), and is but a further declaration of the public policy of the United States as originally expressed in the immigration acts. In my opinion the case is on all fours with that of *United States v. Bitty*, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543, and the interpretation of the statute must be controlled by that decision." The demurrer will be overruled."

The immigration act, as will be observed from a reading of Mr. Justice Harlan's opinion, used the same general language as that found in the White Slave Traffic Act "or for any other immoral purpose". The title of the latter act is "An Act to further regulate interstate and foreign commerce by prohibiting the *transportation therein for immoral purposes* of women and girls, and *for other purposes*".

In the second section of the act, in speaking of the purpose of transportation, the language twice used is "for the purpose of prostitution or debauchery or for any other immoral purpose". Substantially the same language is repeated in Section 3 of the same statute, the words being "or any other immoral practice". The language is as general as could very well be made. The decision in the *Bitty* case, while made under another statute, construes the same general terms and has been recognized ever since as controlling in the proper interpretation or

construction of the White Slave Traffic Act involving the same general language.

While the statute is designated in Section 8 as the "White Slave Traffic Act", the expression white slave or white slave traffic is not mentioned in any of the first five sections of the statute. The first section to deal specifically by name with the subject of "White Slave Traffic" is Section 6.

In Section 6 for the first time we find specific reference to "*White Slave Traffic*". Here we find mention of the international agreement signed at Paris May 18, 1904, and proclaimed by President Roosevelt on June 15, 1908.

The defendant's counsel in these cases rely largely on congressional construction as shown by the report of the majority of the Committee on Interstate and Foreign Commerce, and the debate in the House of Representatives thereon. Of course, we contend that judicial construction must prevail in the interpretation of the plain language of a statute as against legislative construction of the same especially in the absence of language deliberately set into the statute specifically defining its purpose to be otherwise than plainly shown on its face. Since counsel rely so implicitly and confidently on the language of the report of the majority of the committee on interstate and foreign commerce, let us take a look at it.

The bill referred to the committee was one "to regulate and prevent the transportation in inter-

state and foreign commerce of *alien women and girls for immoral purposes and for other purposes*'".

The bill as referred to the committee covered the transportation of *alien women and girls* only. As reported back and as enacted it covered the transportation of *women or girls* unlimited by the fact of *alienage*. The *aliens* were the only persons to reach whom the treaty or international agreement had to be relied on. The majority report in speaking of the provisions of the bill referred to the committee says (at page 2):

"In the second section of the bill it is made a crime for any one to knowingly transport in interstate or foreign commerce any woman or girl *for the purpose of prostitution*, or for the purpose of inducing, enticing or compelling a woman *to become a prostitute*, and in the same section it is also made a crime for any one to knowingly procure a ticket to be used by a woman in interstate or foreign commerce going to a place *for the purpose of prostitution*, whereby such woman shall be actually transported in interstate or foreign commerce * * *.

Section 3 of the bill makes it a crime for any person to knowingly persuade, induce, entice or coerce any woman or girl to go from one state to another *for the purpose of prostitution* and who shall thereby knowingly cause such woman to go or be transported as a passenger &c."

* * *

Section 4 applies only to a girl under the age of eighteen years and is practically the same as Section 3 except that it makes a higher penalty apply to the crime of leading a girl under eighteen to *become a prostitute* and transport her in interstate commerce for that purpose.

* * * "

Let us contrast this language of the bill as stated in the report of the committee with the language of the statute.

Section 2 of the law enacted uses this language:

“That any person who shall knowingly transport or cause to be transported * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or *debauchery or for any other immoral purpose*, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to *debauchery or to engage in any other immoral practice* * * * shall be deemed guilty of a felony, &c.”

Section 3 of the law as enacted on June 25, 1910, after final action thereon by the Senate of the United States, as contrasted with the language of this committee report filed on June 21, 1909, and relied on so implicitly by counsel for respondents in error shows this language:

“Section 3. That any person who shall knowingly persuade, induce, entice or coerce or cause to be persuaded, induced, enticed or coerced * * * any woman or girl to go from one place to another in interstate or foreign commerce * * * for the purpose of prostitution or *debauchery or for any other immoral purpose* or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or *debauchery or any other immoral purpose*, whether with or without her consent * * * shall be deemed guilty of a felony.”

Section 4 of the law, speaking of the enticement of “any woman or girl under the age of eighteen

years'' also adds after the word "prostitution" the added words of the earlier sections "*or debauchery or for any other immoral purpose*".

Section 5 of the statute merely prescribes the court in which prosecution of offenses defined in the earlier sections shall be prosecuted. As above said, Section 6 of the statute is the first one that refers specifically to the White Slave Traffic.

We quote the entire section as follows:

"Sec. 6. That for the purpose of regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white-slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to exercise supervision over such alien women and girls, receive their declaration, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner General of Im-

migration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this Act to the persons, respectively, making and filing them.

Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white slave traffic, shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procurement to come to this country within the knowledge of such person, and any person who shall fail within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white-slave traffic, to file such statement concerning such alien woman or girl with the Commissioner General of Immigration, or who shall knowingly and willfully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning

her procurement to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement, as required by the provisions of this section."

In speaking of Section 6 of the bill reported by the committee of the House, the majority report under the head "International Agreement" uses this language:

"Section 6 of the bill is based *in part upon the right of Congress to regulate foreign commerce and in part upon the right to legislate in furtherance of an international treaty.* The United States in 1908 became a party to an international agreement for the suppression of the white slave traffic, and section 6 makes cer-

tain provisions to aid in carrying out by the United States the international agreement. It provides that the Commissioner-General of Immigration is designated to receive and centralize information concerning the procurement of alien women with a view to their debauchery, to receive their declarations, establish their identity, ascertain from them who induced them to leave their native countries, and to exercise supervision over them. It also provides that every person who *shall knowingly keep or harbor in any house of prostitution any alien woman within three years after she shall have entered the United States* shall file with the Commissioner-General of Immigration a statement concerning such woman, and if such keeper shall fail to file such statement within thirty days then he shall be guilty of a misdemeanor and subject to \$2,000 fine and two years' imprisonment. If the keeper furnishes the statement, the woman under the immigration law will be deported in accordance with existing law. If the keeper fails to furnish the statement, the keeper will be punished.

A careful examination of the Constitution, the authorities, and the decided cases seem to show that the provisions of the bill, dependent upon the commerce clause of the Constitution, *come within the power of Congress and are Constitutional.*

It is no longer open to question that the transit of individuals from State to State is interstate commerce."

At page 6 of the majority report Section 3 of the Immigration Act as amended in 1907 is quoted, showing in its initial portion the following language:

"That the importation into the United States of any alien woman or girl for the purpose of

prostitution or for any other immoral purpose is hereby forbidden."

Referring to Section 3 of the Immigration Statute the report of the majority of the committee under the heading "Supreme Court decisions construing Section 3 of the Act of February 20, 1907" says:

"Section 3 of the act of February 20, 1907, has received the consideration of the Supreme Court in two cases.

In the first case, that of the United States v. John Bitty (208 U. S. 393), the Supreme Court held that a foreign woman being brought to the United States as the *personal, private mistress of a man living here was being imported 'for other immoral purposes', and that, therefore, the importer was subject to the penalty of the statute and the woman to deportation.*

This decision is not pertinent to the phase of the subject under discussion, and is mentioned only in passing.

The second case was that of Joseph Keller v. United States (213 U. S. 138). In the Keller case the Supreme Court was called to pass squarely upon the constitutionality of *that portion of the provision in question which made it an offense to harbor or maintain for the purposes of prostitution any alien woman or girl within three years of her entry into the United States.* The exact language of the provision in question is as follows: '*Or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, etc.*'"

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The case was a *typical case of 'harboring' exclusively*. The uncontradicted testimony was to the effect that the woman, Irene Bodi, came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago and went into a house of prostitution at South Chicago, *which the defendants purchased in November, 1907, finding the woman then in the house*; that she had been in the business of a prostitute for only a few months prior to the trial of the case, in October, 1908, and that the *defendants did not know her until November, 1907*.

The question of the *power of Congress to enact a law for the punishment of any one 'harboring' an alien woman within three years of her arrival*, regardless of whether or not she was a prostitute voluntarily or had entered that state against her will, *was squarely presented by the facts in the case*. The court held that Congress was without power to pass such a law, its position appearing from the statement contained in the following paragraph from the opinion of the court: 'While the keeping of a house of ill fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress.'

Bearing in mind the facts in this case—namely, that so far as appeared in the case presented, the defendants had nothing whatever to do with the importation of the woman in question; that so far as they were concerned she was not in a house of ill fame against her will; and that she was an inmate of the house

when the establishment was purchased as a going concern—the following suggestions of the court contained in the opinion with reference to the conclusion the court might have reached had the facts been different, are important: For instance, the court says, page 144: ‘It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life.’

On page 147, the court says:

‘The question is therefore whether there is any authority conferred upon Congress by which *this particular portion of the statute can be sustained*. By section 2 of article 2 of the Constitution power is given to the President, by and with the advice and consent of the Senate, to *make treaties*, but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary *under which this legislation can be supported*.’

The Government stated in its brief these two propositions:

‘The clause in question should be held valid because it relates to and materially affects the conditions upon which *an alien female may be permitted to remain in this country*, and the grounds which warrant her exclusion. * * *

The validity of the provision in question should be determined from its general effect upon the *importation and exclusion of aliens*.’

The court then, without stating whether or not either of these propositions was well taken,

dismissed them with the statement that 'the act charged has no significance in either direction'.

In considering the decision of the Supreme Court in the Keller case attention is especially called to the fact that in the opinion the court made the following suggestions:

'By section 2 of article 2, of the Constitution, power is given to the President, by and with the advice and consent of the Senate, *to make treaties*, but there is no suggestion in the record or in the briefs of a *treaty with the King of Hungary under which this legislation can be supported.*'

It is manifest that this is a most pregnant suggestion. A showing that the legislation in question was supported by a treaty could not be made at that time, however, for the reason that *at the time of the enactment of the legislation the United States was not a party to the international agreement covering the subject.* In fact, this Government did not adhere to the international agreement until a date *subsequent to the commission of the offense charged against Keller.*

In this connection the chronology of events is important. The existing statute on the subject of the importation of alien women for immoral purposes is contained in section 3 of the act approved February 20, 1907. The alleged illegal act of which the defendant stood convicted was the *harboring of an alien woman on June 1, 1908.* The United States did not become a party to the international agreement for the repression of the trade in white women until June 15, 1908, at which time this Government adhered to the agreement by virtue of a proclamation issued by President Roosevelt. It appears, therefore, that the statute in question became a law, and the offense involved was committed, previous to the date on which this

Government became a party to the international agreement.

So far Congress has not enacted legislation to insure the carrying out of the provisions of the treaty in question.

The following clearly appears from an analysis of the Supreme Court decision above mentioned:

First. That *Congress may properly enact legislation affecting the conduct of an alien while residing here for a period of at least two or three years after the alien's arrival.*

Second. That Congress may provide for the punishment of wrongs done to an alien during the probationary period—that is to say, the Supreme Court intimates very broadly that Congress has the power to enact a law *making it an offense to 'harbor' for immoral purposes, by force or against her will, an alien woman or girl within the limited period referred to.*

Third. That in the carrying out of a treaty obligation Congress has the authority to pass an act making it an offense to harbor an alien woman or girl for immoral purposes, even in the absence of a showing that force or restraint is used—that is to say, in the decision above referred to the Supreme Court suggests that a different conclusion might have been reached under the very clause then under consideration and it appeared that the provision in question was the carrying out of a treaty agreement."

The reference as made by the committee to the Bitty and Keller cases in no way discounts the full value of the Bitty case as sustaining the government's contention in the case at bar.

The report of the committee further shows that in its opinion, notwithstanding the ruling in the

Keller case, that Congress *prior to the international agreement or treaty* had no power to create a law making the harboring within the United States of a woman for the purpose of prostitution or for other immoral purpose, yet the bill as reported and as finally enacted would be clearly within the constitutional power of Congress.

The Bitty case as we have seen, clearly held that bringing a woman into the United States *for an immoral purpose* other than for prostitution *or to become the concubine or mistress of the importer*, was an offense which could be reached by federal legislation. The Keller case in no sense impairs the force or efficacy of that ruling as announced by Mr. Justice Harlan. Even the Keller case, according to the opinion of the majority of the House committee, no longer governs a condition of facts such as that presented to the court in the Keller case. The making of the international agreement or treaty following the suggestion of the Supreme Court in the Keller case, according to the opinion of the committee, clearly gave the Congress the right under the Constitution, to make "harboring" within a definite time of the arrival in this country of a prostitute, an offense under the statutes of the United States.

In our opinion and in that of every federal court passing on the question, since its announcement, the rule in the Bitty case clearly and absolutely sustains our contention in the matter of the proper construction of the so-called "White Slave Traffic Act". It

clearly sustains our contention that the act is constitutional legislation. It clearly sustains our contention that the transportation in either interstate or foreign commerce of a woman to become the concubine or mistress of the transporter makes him amenable to punishment under the letter of the statute. The Keller case was relied on in group of white slavery cases (Hoke and others) reported in 227 U. S. in supporting the contention there made that the statute was an invasion of the police powers of the states and without the grant of powers to Congress by the federal constitution. This contention availed not in that group of cases nor has it availed in any federal tribunal passing on the question since the decision in the white slavery cases announced by Mr. Justice McKenna.

The Bitty case absolutely sustains our contention that it was within the constitutional power of Congress to legislate against immoral practices other than commercialized vice. The Bitty case is still the law. Its force and authority has not been to any extent impaired by any ruling announced in the Keller case. The Keller case has lost its force and authority by reason of the international agreement or treaty entered into since that decision was announced. The condition of facts presented in the Keller case can clearly be reached by congressional action taken since the making of the international agreement or treaty covering the question. Furthermore, the Bitty case is recognized by the so-called white slavery cases reported in 227 U. S., by the

Jack Johnson case, decided by the Circuit Court of Appeals, and by the Flasboller case in 205 Fed. Rep. 1006.

The Paris agreement added nothing to the power of the Congress to legislate for American residents or citizens on the subject of vice other than commercialized vice. Under the commerce clause of the Constitution, the Congress had clearly the power to enact legislation by which it was made a crime to transport in interstate commerce women or girls for immoral purposes other than prostitution or commercialized vice, so-called.

XVIII.

IF AS TO ANY ONE OF THE FOUR COUNTS UNDER WHICH DEFENDANT WAS FOUND GUILTY THE INDICTMENT AND PROOF WERE SUFFICIENT, AND NO PREJUDICIAL ERROR IS SHOWN IN THE TRIAL OF THE ISSUES AS TO SUCH ONE COUNT, NO REVERSAL CAN BE ALLOWED.

Defendant Diggs was indicted on six counts. He was found guilty as to four. The penalty imposed was imprisonment for two years and a fine of \$2000. Under Sections 2 and 3 of the statute the maximum penalty in each case is \$5000 fine and five years imprisonment. If the record shows a sufficient indictment as to any one of the four counts on which defendant was found guilty, competent testimony in support thereof and absence of prejudicial error in the trial of the issues as to such one count no reversal should be ordered of the judgment. In

Johnson v. United States, 215 Fed. 687, the Circuit Court of Appeals of the Seventh Circuit, said:

“If one criminal act is charged in several ways one good count supported by competent evidence, will sustain a general verdict of guilty. If several criminal acts are charged, and if the sentences are made to run concurrently, the same rule applies.”

In *Kalen v. United States*, 196 Fed. 888, the court held that

“Where a defendant indicted on two counts was convicted on both, and was given less than the maximum sentence permissible under either one, it is no ground for reversal of the judgment that one of the counts may have been defective.”

See also in this connection

McDonald v. United States, 63 Fed. 426;

Evans v. United States, 153 U. S. 584; 38
Law Ed. 830;

Claasen v. United States, 142 U. S. 140; 35
Law. Ed. 966.

Summary.

Before bringing this argument to a close, we desire to suggest that a companion case is before the court for consideration,—*United States v. F. Drew Caminetti*, No. 2405. Both cases involve the same four persons and the same general facts. They both deal with the illicit relations existing between Marsha Warrington and Maury I. Diggs

and Lola Norris and F. Drew Caminetti, between October, 1912, and March 14, 1913. The same questions of law, with the exception of some minor matters, are presented by the record in each case. We respectfully request that in disposing of either case the argument of counsel presented in the other may be taken into consideration by the court.

In view of the length of the argument we have prepared an index showing the pages at which indicated subject matters have been considered. The index precedes the argument.

The facts alleged in the four counts of the indictment on which the defendant was found guilty were clearly established by the testimony presented during the trial. No doubt could exist in the mind of any reasonable being that the paramount purpose of Diggs in procuring the tickets and securing the Pullman accommodations for the transportation, was that he might continue his illicit relationship with Marsha Warrington in the State of Nevada and that his companion should likewise consummate his purpose of effectuating the ruin of the girl, Lola Norris. He fully intended, as did his associate, that the two women should, in Nevada, act as the mistresses and concubines of the two men. From early in October, 1912, until March, 1913, the two men acted together under all possible circumstances of time and place for the accomplishment of their common design,—the ruin of the two girls.

As to the law of the case we claim the following:

1. Much stress has been laid by counsel for plaintiff in error on the proposition that the trial judge committed error in commenting in his charge on the silence of the defendant and his failure to explain or deny the incidents of the Reno trip. The authorities abundantly sustain our position that it is clearly within the function of a federal judge to express his opinions as to matters of fact provided always that he informs the jury that whatever opinion he may have expressed, they ultimately have the exclusive right to pass on all questions of fact.

Since the elimination of the Missouri cases by decisions reported in 157 and 158 S. W., practically no judicial authority sustains the position taken by counsel on this matter. The Balliet case, so much relied on by them, certainly affords no foundation for the claim made that either Judge Van Fleet erred in his charge or that counsel for the government in their argument were guilty of misconduct in contending that the jurors in arriving at a verdict might take into account the fact that Diggs had failed to testify as to the incidents of the Reno trip.

2. Marsha Warrington and Lola Norris, neither in law nor in fact were accomplices of defendant Diggs. There was no reason why the trial judge should instruct the jury that they were such accomplices or that their testimony should be received with caution or viewed with distrust.

In this connection see the following language quoted by Judge Cooper at page 20 of his argument as printed:

“The following extracts show the general understanding in the House as to the scope of the bill.

45 Cong. Rec., Pt. 1, p. 812:

‘MR. RICHARDSON. *This bill does not punish the alien woman, or any other woman, for being transported from one State to another, does it?*

MR. SIMS. Do you desire that it should?

MR. RICHARDSON. I am asking you if it does. Yet you punish the man who aids the woman. *You punish him for aiding a crime that you do not punish her for committing.’ ”*

3. The amazing proposition that the only issue involved in the indictment escaped the attention of the trial judge and of counsel for the government has certainly not been established by plaintiff in error.

4. The matter of the blood-stained sheet, so frequently and so bitterly adverted to by counsel, hardly deserves the dignity of passing mention.

5. The charge of misconduct during the argument by both counsel for the government is absolutely without adequate or any foundation in the record. Whatever was said by them during argument and whatever suggestion was made by them or either of them to the jury, as to the proper discharge of their duty was clearly legitimate argument and in no way transcended the proper limits set for forensic discussion. If, however, as a matter

of fact, any language or conduct of counsel could be regarded as sufficient basis for a charge of misconduct, no proper procedure was resorted to by counsel for plaintiff in error for the purpose of bringing that question regularly before this court for review.

6. The seemingly serious objection urged by counsel for the defendant to the asking of the question, what he meant by the Reno trip, has been absolutely disposed of by reference to the record of his testimony.

7. No error was committed by the trial court in the matter of refusing to allow the defendant to reopen the examination of jurors after they had already completed such examination.

8. The record affords no evidentiary foundation for the claim that the court erred in not instructing the jurors that they might consider whether the witnesses Warrington and Norris had acted under any improper influence or had been promised immunity for their testimony.

9. The trial judge was clearly warranted by the testimony in stating that the evidence produced before them by the government, if believed, was sufficient to warrant a conviction. The language used by the trial judge in this connection was not the equivalent of that criticized in *Breece v. United States*, that "In his opinion it was the duty of the jurors to convict".

10. The defendants were not entitled to have the cause transferred to Sacramento for trial.

11. The enactment of the White Slave Traffic Act was a legitimate exercise of the legislative power of the Congress under the constitution of the United States. The question of the constitutionality of the law has been repeatedly determined by the highest tribunal in the land.

12. There is no merit in the point urged by counsel for defendant that the immorality denounced by the White Slave Traffic Act is *only commercialized vice*. Even the congressional report so much relied upon by defendant's counsel, if carefully examined, affords no foundation for the claim so persistently made by them that the statute was not intended to cover other cases of immorality than that which they are pleased to term the traffic in white slaves. The report shows conclusively that the bill reported on December 21, 1909, was not in form the same as the law when finally enacted six months later after passing through the Senate. Both the Immigration Statute and the White Slave Traffic law cover other cases than prostitution. The construction put by the Supreme Court on the language of the Immigration Statute, must be followed in passing on the identical language when found in the White Slave Traffic Act. Under the facts and the law, the judgment of the trial court should be allowed to stand as the

final and proper determination of the questions here involved.

Dated, San Francisco,

November 28, 1914.

Respectfully submitted,

THEO. J. ROCHE,
*Special Assistant to the
Attorney General.*

JEREMIAH F. SULLIVAN,
Of Counsel.

IN THE
UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURY I. DIGGS,

Plaintiff in Error,

VS.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

REPLY TO BRIEF OF SPECIAL ASSISTANT
TO THE ATTORNEY GENERAL

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Filed

JAN - 5 1915

F. D. Monckton,
Clerk.

Filed this.....day of December, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MAURY I. DIGGS,

Plaintiff in Error,

vs.

UNITED STATES OF
AMERICA,

Defendant in Error.

No. 2404.

REPLY TO BRIEF OF SPECIAL
ASSISTANT TO THE ATTOR-
NEY GENERAL.

When this case was called for argument, Mr. Roche stated that he did not have his brief prepared, and asked time to file it later. This was granted, and the plaintiff in error, called throughout the defendant, was allowed to reply, if he desired that privilege. The oral argument was limited in its scope, but the brief filed by Mr. Roche covers a wide field. We, therefore, submit the following reply:

I.

Forty-four pages of Mr. Roche's brief are devoted to facts antedating the Reno trip, enlarged on for the purpose of showing moral depravity on the part of the defendant. But, taking the testimony quoted by Mr. Roche, without referring to other parts of the transcript, it shows:

1. That the relations between the prosecuting witness and defendant Maury Diggs had commenced long before the Reno trip was ever thought of.

2. That both parties were guilty of culpable conduct.

3. That such conduct could have been prosecuted under the state laws.

4. That the so-called Reno trip was but a continuation of such conduct.

5. That to constitute the trip to Reno a crime, it was necessary that it should have been taken for the *purpose* stated in the indictment, or at least for a *purpose* denounced by the Mann Act. The *purpose* is the gist of the offense. The evidence quoted by Mr. Roche shows that such was not the purpose of the trip.

6. It was proven by the defendant that he had been *told* that he and the girls were about to be arrested, and he believed it to be true. The witnesses who told him this were produced and so testified. The prosecution attempted to prove that no warrant had been issued for his arrest. This was true, but did not affect the fact that he had been *told* that such a warrant was to be issued.

7. The plaintiff had also been *told* by one of the girls that a reporter on a local paper was about to publish an account of their escapades. Lola Norris said she had been so informed by Marsha Warrington. The prosecution attempted to contradict this, not by showing that he was not so *told*, but that such a tale was not, in fact, to be published. This was not a contradiction of the fact that the defendant had been *so informed*.

8. The father of Maury Diggs was about to have him arrested. This is uncontradicted.

9. All the testimony quoted by Mr. Roche shows conclusively that the *purpose* of the trip to Reno was to escape notoriety and arrest.

Such testimony, measured by its legal effect, while it may show moral delinquency, does not

show the commission of the crime charged in the indictment. But a jury, who cannot differentiate between what constitutes a state offense and a federal offense, are apt to think that a defendant should be convicted on general principles, and this we contend was what was done in the court below. The defendant was not placed on trial for moral delinquency, but for a specific offense.

II.

We contend that the instruction of Judge Van Fleet, on the question of defendant's failing to testify to certain facts, could be used against him, as a matter of law, was erroneous. We contend that it placed an undue burden on the defendant. We maintain that it was misleading. This instruction, or one of similar import, is condemned in

Balliet v. United States, 129 Fed. 689,
696.

IN NO CASE HAS SUCH AN INSTRUCTION BEEN UPHOLD.

Conceding that *counsel in his argument* may comment upon the matter without error, this is quite a different thing from the court *instructing the jury*, as a matter of law. Many courts hold that even counsel cannot comment upon it at all. No court holds that the judge can give an instruction, such as was given in this case.

Speaking of the Balliet case, Mr. Roche says (Page 88):

“If it asserts the doctrine claimed by counsel and is the leading case on the subject, it is somewhat remarkable that it has

never been, at any time, cited by any federal court as sustaining the doctrine here contended for by plaintiffs in error."

In reply, we may say that this case has never been repudiated by any court, and that probably the Diggs and Caminetti cases and the Balliet case are the *only cases* in which such an instruction has been given. Mr. Roche, in his elaborate brief, presents, and we assume, in view of his great industry and research, has been able to find, no case in which such an instruction has been upheld. The best that he can do is to present cases in which counsel in argument have been allowed to comment. Counsel may be mistaken, and the jury may disregard everything that he says, but, in a jury trial, the jury *must* take the law as the court gives it to them, and if the court gives them that which is not the law on a material point to a defendant's disadvantage, the defendant has not had that legal trial to which he was entitled.

The trial court in the case at bar went much too far when it told the jury that:

"It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him he would have done so."

IT IS MOST SIGNIFICANT THAT THE TRIAL JUDGE, IN HIS SUBSEQUENT CHARGE TO THE JURY IN THE CASE OF F. DREW CAMINETTI (now also pending in this Appellate Tribunal), ELIMINATED THE WORDS: "IT IS A LEGITIMATE INFERENCE THAT COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM HE WOULD HAVE DONE SO." (See this fully explained on page 85 of the Opening Brief in this Court in the case of Caminetti v. United States, No. 2405; compare also language of both charges as contained in the respective transcripts of record; in the Diggs case at pages 390-391 of the transcript of record, and in the Caminetti case at pages 439-440, 445, of the transcript of record.)

THIS, OF ITSELF, INDICATES MOST STRONGLY THAT THE LEARNED JUDGE OF THE COURT BELOW, IN INSTRUCTING THE JURY IN THE SUBSEQUENT CAMINETTI TRIAL, CONSIDERED THAT HE HAD GONE ENTIRELY TOO FAR IN CHARGING THE JURY AS HE DID IN THE DIGGS TRIAL, AND, FOR THAT REASON, ELIMINATED FROM HIS SUBSE-

QUENT CHARGE IN THE CAMINETTI CASE, THE LANGUAGE: "IT IS A LEGITIMATE INFERENCE THAT COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM HE WOULD HAVE DONE SO." OTHERWISE, THE INSTRUCTIONS TO BOTH JURIES IN THE DIGGS AND CAMINETTI CASES, ON THIS PARTICULAR SUBJECT, ARE EXACTLY THE SAME. WE RESPECTFULLY SUBMIT THAT THE ELIMINATION, BY THE TRIAL JUDGE, OF THE ABOVE QUOTED LANGUAGE CAN BE EXPLAINED ON NO OTHER THEORY BUT THAT HE CONSIDERED THAT HE HAD SUBSTANTIALLY ERRED IN HIS INSTRUCTIONS IN THE DIGGS CASE AND THAT HE SOUGHT TO AVOID A REPETITION OF THE SAME ERROR IN THE CAMINETTI CASE BY ELIMINATING THE LANGUAGE ABOVE QUOTED. HOWEVER, WE SUBMIT THAT EVEN THE INSTRUCTION IN THE CAMINETTI CASE, MODIFIED AS IT WAS, IS EQUALLY ERRONEOUS AND CONSTITUTES REVERSIBLE ERROR.

It is not necessary to repeat the language of the court of appeals in the eighth circuit showing why such an instruction is erroneous, misleading and prejudicial.

We do not concede, as a proposition of law, or of logic, or of reason, or of sense, or of fact, that "it is a legitimate," or any just, or reasonable, "inference" that because a defendant does not deny or explain *all* the incriminating evidence against him it is for the reason that he cannot truthfully deny or explain. Our common knowledge and experience in human affairs teaches us that many things, at times, cannot be explained or denied, or at least satisfactorily explained or denied. Defendants are often the victims of circumstances and are placed in such positions that they are unable to explain many matters.

The instruction in the case at bar, as in the Balliet case, certainly went entirely too far. We can perceive no real distinction between telling the jury, as was done in the Balliet case, that: "You may consider in determining the question, the fact that the defendant having gone upon the witness stand, *if he has not fully explained, or has not explained matters which are material to the issues in this case and which are naturally within his knowledge, you may*

consider that as a circumstance tending to show that the facts if explained would bear out the contention of the Government, and his failure to give them or to give a truthful explanation is against him," and telling the jury, as was done in the case at bar, "*if he (defendant) has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; SINCE IT IS A LEGITIMATE INFERENCE THAT, COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM, HE WOULD HAVE DONE SO.*" Placed side by side, both instructions amount to substantially the same thing. They are unfavorable and prejudicial to a defendant. They place him in a most unfavorable and prejudicial attitude before the jury. They indicate a hostile attitude on the part of the trial Judge. They place an undue burden upon a defendant, requiring him to explain or deny *everything* of an incriminating nature. They are misleading. The jury is not informed what acts of an

incriminating nature the defendant must explain or deny.

As was well said by the Supreme Court of the United States, in the case of *Hicks v. United States*, 150 U. S. 442; 37 L. Ed. 1137, 1138, 1141: "Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, *to whose lightest word the jury, properly enough, give a great weight*, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a *competent* witness.' THE POLICY OF THIS ENACTMENT SHOULD NOT BE DEFEATED BY HOSTILE COMMENTS OF THE TRIAL JUDGE, WHOSE DUTY IT IS TO GIVE REASONABLE EFFECT AND FORCE TO THE LAW."

The instructions of the trial court, in the case just cited, were not nearly as prejudicial as the instructions in the *Balliet* case and in the case at bar, and yet the Supreme Court

declared that: "The policy of this enactment *should not be defeated by hostile comments of the trial Judge, whose duty it is to give reasonable effect and force to the law.*"

We have made a most painstaking examination of every authority and statement of a text-writer referred to by the able counsel for the Government in their brief. In maintaining their contention, that "the accused having voluntarily taken the witness stand waived *all* immunity" (see subdv. IV, pp. 73-90), it will be noted that counsel for the Government constantly confuses and confounds the failure or refusal of a defendant to *answer proper and material questions actually put to him on cross examination* with a radically different situation existing in the case at bar where it appears that the defendant *never refused to answer any proper or material questions.*

We respectfully submit, as too plain for argument, that it is one thing, in the law, for a defendant to fail or refuse to answer proper and material questions, and that such failure or refusal to answer proper and material questions may be commented upon by the prosecuting attorney in his argument to the jury; and that it is quite another and different thing to permit the prosecuting officer to comment

upon the fact that the defendant did not explain or deny certain matters when the prosecuting attorney either could not lawfully, on cross examination, or did not see fit to, ask the defendant to explain or deny the matters referred to by him in his argument to the jury.

We concede that, if the defendant in the case at bar, on being cross examined by the prosecuting attorney, had either failed or flatly refused to answer proper and material questions, actually put to him, his conduct in that connection and his failure or refusal could be commented upon by the prosecuting attorney.

BUT THAT IS NOT THE CASE AT BAR. THE DEFENDANT DIGGS NEVER REFUSED OR FAILED TO ANSWER ANY PROPER OR MATERIAL QUESTIONS.

SUCH BEING THE FACTS, HOW CAN THE SEVERAL AUTHORITIES AND PASSAGES FROM TEXT-BOOKS RELATING TO THE FAILURE OR REFUSAL OF A DEFENDANT "TO ANSWER PROPER AND MATERIAL QUESTIONS" BE DEEMED APPLICABLE?

Briefly, we refer to the authorities and statements of the law, cited by counsel for the Government, to show their utter inapplicability to the case at bar.

On pages 89-90, of the Government Brief, counsel calls attention to the case of *Fitzpatrick v. United States*, 178 U. S. 304, 316; 4 L. Ed. 1083. That was a case involving the question solely of the *proper limits* of the cross examination to which a defendant subjects himself when he takes the stand. This is not the situation in the case at bar. In our Opening Brief, pages 33-35, we referred, at considerable length, to the leading case of *Fitzpatrick v. United States*, *supra*, and showed unquestionably that that case only involved the point, as to the proper limits of the cross examination to which a defendant subjects himself when he takes the stand.

On pages 90-92 of the Government Brief, reference is made to the case of *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88-91. That case is absolutely inapplicable and relates to a refusal of a defendant, in that case, "to submit to a full cross examination, within proper limits." That is not this case. The defendant Diggs never refused to submit to a full cross examination within proper limits.

On page 90 of the Government Brief, reference is made to a note in the third edition of Judge Cooley's work on Constitutional Limitations, referring to the Ober case. Of course, the observations of Judge Cooley, in citing the Ober case, related to "the right of comment where the party makes himself his own witness and *then refuses to answer proper questions*," a radically different situation from that existing in the case at bar.

On pages 91-92 of the Government Brief, reference is made to the case of State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688, where after a review of the authorities on the subject it was held in that case, as shown by the syllabus, that (2) the defendant "could not refuse to answer questions put on cross examination to discredit his direct evidence, on the ground that answering would incriminate himself." This mere statement shows its utter inapplicability to the case at bar.

On page 92 of the Government Brief, counsel refers to 12 CYC, pp. 576-7, as stating the rule on the subject. But "the rule on the subject" will be found to relate to the proposition that: "The prosecuting attorney then has the same rights to attack his (defendant's) credibility in argument or to comment upon his testimony

OR UPON HIS FAILURE OR REFUSAL TO ANSWER PROPER AND MATERIAL QUESTIONS WITHIN HIS KNOWLEDGE AS IN THE CASE OF ANY OTHER WITNESS." That is not this case. The defendant Diggs never refused to answer any proper or material questions on cross-examination. Had counsel for the Government read a little further in CYC., Vol. 12, on the next page, pp. 577-578, he would have found the rule applicable to the situation in the case at bar stated as follows:

"In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross examination as to matters not touched upon in direct examination.*"

In the Federal courts and in the courts of the State of California, the right of cross examination is restricted to matters inquired of in chief.

12 CYC., 577, 578;

People v. McGungill, 41 Cal. 429;

People v. Saunders, 114 Cal. 216;

State v. Elmer, 115 Mo. 401; 22 S. W. 369;

State v. Fairlamb, 121 Mo. 137;

State v. Baldsoer, 88 Iowa 55;

Balliet v. United States, 129 Fed. 689;
 United States v. Mullaney, 32 Fed. 370;
 Sec. 13, Art. 1, Const. of Cal.;
 Sec. 1332, Cal. Penal Code.

In the case of United States v. Mullaney, just cited, Mr. Justice Brewer said:

“Of course, cross examination is, in the Federal Courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony.”

The case of *People v. Mead*, 145 Cal. 500, cited on page 92 of the Government Brief, is not applicable at all because, in that case it appeared “that the defendant had testified **EQUIVOCALLY** on that subject and denied the marriage, if at all, only by implication.” It was held that the prosecuting attorney had the right to comment upon the **EQUIVOCAL** manner in which he testified and denied the marriage. That is not this case.

The same may be said of another California case cited by counsel for the Government on page 92 of his Brief, the case of *People v. Wong Bin*, 139 Cal. 65-66. In that case, the defendant took the stand and “went *fully* into the details of the difficulty, claiming that the

killing was in self defense.” Having gone *fully* into the subject, it was held that “under these circumstances the District Attorney was authorized in commenting upon his failure to deny certain alleged statements testified to by other witnesses to have been made by him, *inconsistent with his testimony given on the trial.*” The Supreme Court of California immediately qualified this language by adding: “The question thus presented is VERY DIFFERENT from the case where the defendant is not a witness at all, OR A WITNESS ONLY AS TO SOME FORMAL MATTER.”

The case of Powers v. United States, 223 U. S. 303-316; 56 L. Ed. 448, cited on page 93 of the Government Brief, is also utterly inapplicable to the situation in the case at bar. That case, like the Fitzpatrick case, involved the question as to the proper limits of the cross examination of the defendant. That is not the case at bar. No question as to the proper limits of any cross examination of the defendant Diggs arises in this connection.

The case of Sawyer v. United States, 202 U. S. 150-168; 50 L. Ed. 979, cited on page 93 of the Government Brief, is also utterly inapplicable to the situation in the case at bar.

The question involved in that case was as to the proper limits of the cross examination of the defendant. The Supreme Court, through Mr. Justice Peckham, held: "It has been held in this Court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution *has the right to cross examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime.*" (Citing *Fitzpatrick v. United States*, 178 U. S. 304; 44 L. Ed. 1078, 20 Sup. St. Rep. 944.) No such proposition is involved in the case at bar.

The case of *Cotton v. State*, decided by the Supreme Court of Alabama, 6 South. 372, cited on page 93 of the Government Brief, is also, upon the facts, utterly inapplicable to the case at bar. There, it appeared that: "Defendant was sworn and examined on his own request, and REFUSED TO DENY that he took the steer, or that he sold it to one Beasley." In his argument to the jury, the prosecuting attorney was held justified in commenting on the refusal of the defendant to deny as above stated. Such a state of facts does not exist in the case at bar.

We are unable to find a case of *Graves v. State*, claimed, by counsel for the Government, on page 94 of their Brief, to be reported in 7 South. 317, but if it is anything like the case of *Cotton v. State*, *supra*, it is self-evident that it is inapplicable to the case at bar.

The case of *State v. Harrington*, 12 Nev. 129, relied upon by counsel for the Government on page 93 of their Brief, is also inapplicable as to the facts, and furthermore, what is there said is clearly obiter dictum.

In that case, it appeared that: "Counsel for defendant, in his argument before the jury, which preceded that of the district attorney, claimed and argued that the statements of witness Merrow were false. The district attorney in his reply, *without objection on the part of counsel for defendant or the court*, stated to the jury 'that, inasmuch as the defendant, when testifying in his own behalf, had not contradicted the statement of Merrow, they must take said statement as absolutely true, that therefore it was true.' "

The case was reversed. The Supreme Court, in its opinion, approved of one of the very authorities cited by us in support of the point we make that error was committed by the trial

court. That authority is *People v. McGungill*, cited by us on pages 28, 52 of our Opening Brief. The Supreme Court of Nevada, in approving of the law as declared in the case of *People v. McGungill*, said:

“In the second case, (*People v. McGungill*) the defendant offered himself as a witness in his own behalf, and was only asked if he had had certain conversation with one Yates, testified to by said Yates, and he answered that he had not. *He was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court.* Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross examined as to the whole case. Defendant’s counsel protested against such comments, but they were continued by permission of the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross-examined as to the whole case. *If the court had compelled defendant to answer beyond the line of legitimate cross examination, its action would have been error in a double sense; first, in allowing counsel to press in cross examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary*

witness under established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt."

It need not be stated that the facts of the two cases cited and the one in hand are so widely different that the former are no authority for appellant in this case.

In addition to the foregoing, it is proper to remark that it is apparent to our minds, from the bill of exceptions, that the comments of the district attorney complained of were called by those of the defendant's counsel in declaring the testimony of the witness Merrow to be false. In reply, the district attorney, to sustain the witness, and to show the truthfulness of his testimony, stated that the defendant, although he had an opportunity to do so, had not contradicted the witness. The comments, under the circumstances, were proper."

By approving of the law as declared in the case of *People v. McGungill*, the Supreme Court of Nevada really supports the position we maintain in the case at bar.

In fact, the language of the Supreme Court of Nevada, in the case of *State v. Harrington*, can readily be paraphrased so as to apply to the facts of the case at bar as follows:

“He (defendant) was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court. Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross examined as to the whole case. Defendant’s counsel protested against such comments, but they were continued by permission of the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross examined as to the whole case. If the court had compelled defendant to answer beyond the line of legitimate cross examination, its action would have been error in a double sense; first, in allowing counsel to press in cross examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under the established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant’s guilt.”

The case of *State v. Grubb*, 99 S. W. 1083, referred to on pages 101-103 of the Government Brief, “does not, in terms, repudiate or reverse the earlier Missouri decisions,” as is

conceded by counsel for the Government on page 103 of the Government Brief. The case involved the theft of certain cattle and the possession of them and the district attorney had adverted to the failure of the defendant charged with larceny to explain the possession of stolen property recently after it had been stolen. As was well said by the Supreme Court of Missouri in that case, the law “was never intended to prohibit, nor did it have the effect of prohibiting, a court having criminal jurisdiction from instructing a jury as to *the presumption arising from the recent possession of stolen property*, nor to deprive counsel for the State of arguing the effect of the failure by defendants charged with larceny *to explain the possession of stolen property recently after it had been stolen.*”

Obviously, the facts of that case and the law involved are entirely different from those involved in the case at bar.

Counsel for the Government claims that recent decisions by the Supreme Court of Missouri have reversed or repudiated the earlier Missouri decisions. An examination of these decisions will show that, as to the facts involved, they are utterly inapplicable to the legal situation in the case at bar and now pre-

sented to this Appellate tribunal because of the instructions of the trial court. They involved comments of prosecuting officers and not instructions such as are presented for consideration in the case at bar.

In the case of *State v. Raftery*, 158 S. W. 585, 587, referred to on page 103 of the Government Brief, it affirmatively appears that the trial Court instructed the prosecuting attorney "not to comment on any portion of the case that he (defendant) did not testify about. I will ask the jury to disregard that statement." It was held, on appeal, that the rights of the defendant in that case had been fully protected by the instructions of the trial Judge to disregard the uncalled for comments of the prosecuting officer.

In the case at bar, the trial Judge not only refused to check or reprove counsel for the Government in their comments upon the failure of the defendant to explain that or this or some other matter, which they deemed of an incriminating nature, but the trial Court, on more than one occasion, stated in the presence of the jury that he would instruct the jury in accordance with the arguments of counsel for the Government.

The next case referred to by counsel for the Government in their Brief, on pages 103-109, is that of *State v. Larkin*, 157 S. W. 600-4. That case involved comments made by the prosecuting attorney in his argument to the jury. It certainly did not involve an instruction, such as is presented in the case at bar. It was held that the trial Court had fully protected the rights of the defendant in that case in stating: "The court has said to stay within the record and *that should not be commented on.*" The Supreme Court of Missouri, after an elaborate examination of the statutes of that State applicable to the rights of a defendant as a witness in his own behalf and a review of a number of authorities relating to the rights of prosecuting attorneys to comment upon the testimony given by defendant, concluded: "That the point made by the defendant touching the comment of the prosecuting attorney, so far as the objection thereto was applicable to the facts, was *allowable.*" (See page 607.) The court also stated, on page 604:

"Leaving for a moment the broad and ever recurring question of the right of prosecuting attorneys to comment upon the failure of a defendant who takes the stand, to testify to facts within his knowledge, or to facts and statements attributed to him, we might say in passing that upon

the record and outside of this question *there is no warrant in the testimony for the statement of the prosecuting attorney.*
 * * * *In our view the chief vice in the utterance of the prosecuting attorney in this behalf arose from the fact that he was not correctly quoting what the record showed."*

The case was reversed on this and other grounds and sent back for a new trial. In view of what the Supreme Court of Missouri stated, as to the comments of the prosecuting attorney, we submit that much of its opinion is obiter dictum. Certainly the situation in that case is radically different from the one presented by the record in the case at bar. That case involved simply comments of the prosecuting officer, which the record showed were not justified, and the trial Court fully protected the rights of the defendant by instructing the prosecuting attorney: "to stay within the record and *that should not be commented on.*" (See page 603.)

But, in the course of its opinion, the Supreme Court of Missouri concedes that the rule in the State of California is entirely different. As we have seen, the rule in the State of California is the same as that which exists in the Federal Courts. In other words, "cross examination is, in the Federal courts, limited

to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony.” (Language of Mr. Justice Brewer in *United States v. Mullaney*, 32 Fed. 370. See authorities set forth on pages 28-30 of our Opening Brief and repeated on pages 16-17 of this Reply Brief.)

The rule is well settled and is thus summarized in CYC, Vol. 12, pp. 577-578:

“In those states where the accused is subject to cross examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*”

See, also,

Cooley Const. Lim., (6th ed.) 384-386;
State v. Lurch, 12 Oregon, 99;
State v. Graves, 95 Mo. 510;
People v. O'Brien, 66 Cal. 602;
Gale v. People, 26 Mich. 157;
Fitzpatrick v. U. S., 178 U. S. 304;
Balliet v. United States, 129 Fed. Rep. 689.

As to his examination and cross-examination, the defendant stood as any other witness in the case, but he was still within the protection of the Constitution, and not required to furnish evidence against himself.

It is clear that the prosecuting attorneys had no right to interrogate defendant concerning anything not relevant to his examination in chief, and for the stronger reason, the trial Judge had no right to comment or instruct where the prosecutor could not inquire, and the jury should not have been directed to draw adverse inferences from a reserve which the law holds sacred against intrusion.

The fact, therefore, that defendant Diggs went upon the stand and testified did not justify the instructions complained of.

All of the authorities referred to in the case of *State v. Larkin*, *supra*, and also referred to by counsel for the Government in their Brief on pages 104-105, and also a few other cases, referred to on pages 97-99, involved, with perhaps one or two exceptions, the propriety of comments made by prosecuting attorneys in their arguments to the jury and the ever-recurring question whether the comments, under the particular and peculiar circumstances of each case, were justifiable. IN NOT ONE OF THOSE CASES WAS THE QUESTION PRESENTED OF INSTRUCTIONS TO A JURY SUCH AS ARE INVOLVED IN THE CASE AT BAR. NOT ONE OF THOSE DECISIONS OR AUTHORITIES

UPHOLDS INSTRUCTIONS SIMILAR TO THE ONES PRESENTED FOR CONSIDERATION TO THIS APPELLATE TRIBUNAL IN THE CASE AT BAR. COUNSEL FOR THE GOVERNMENT ARE UNABLE TO CITE TO THIS HONORABLE COURT ONE SINGLE AUTHORITY UPHOLDING THE INSTRUCTIONS GIVEN BY JUDGE VAN FLEET IN THE CASE AT BAR. THE CIRCUIT COURT OF APPEALS, IN THE BALLIET CASE, SEVERELY CRITICIZED AND HELD TO BE REVERSIBLE ERROR AN INSTRUCTION VERY SIMILAR TO THE ONE PRESENTED FOR CONSIDERATION IN THE CASE AT BAR. THE REASONING, THE LOGIC, OF THE OPINION RENDERED IN THE BALLIET CASE APPLIES, WITH PECULIAR FORCE, TO INSTRUCTIONS SUCH AS WERE GIVEN IN THE CASE AT BAR. THE RATIONALE OF THE OPINION IN THE BALLIET CASE SHOWS CLEARLY AND CONVINCINGLY THAT SUCH INSTRUCTIONS AS WERE GIVEN IN THE CASE AT BAR ARE ERRONEOUS, MISLEADING, AND INDICATE A HOSTILE ATTITUDE ON THE PART OF THE TRIAL JUDGE.

In closing our argument on this most important branch of the case, we put this question to this Honorable Court, paraphrasing the apposite language used by the Circuit Court of Appeals in the Balliet case (129 Fed. Rep. 689, 696): "Are you able to say with certainty, as you must be to uphold the verdict, that the defendant was not prejudiced by the instruction?"

III.

On the point that the Court erred in not instructing the jury that the young women were accomplices, Mr. Roche quotes the evidence given for the Government to show that they were not accomplices, but he ignores the evidence introduced by the defendant showing that they counseled and aided the defendant. The act in which they took part was a crime—punishable by the State law, and the young women were at liberty, on bail, at the time on an accusation charging them with an offense. The law as to accomplices is based upon the theory that when two persons are implicated in an act, or a series of acts, for which both may be punished in some tribunal, and one attempts to throw all the blame upon the other, the jury should be told to view with suspicion the testimony of the person seeking to shield himself and incriminate the other. It is immaterial whether the young women could be punished under the Mann law, or under the State law. They could be punished and had been arrested for the same acts for which the defendant was being tried, and at the time of the trial in the court below the cases against them were pending in the State court. They had been arrested and held as principals equally with the defendants Diggs and Caminetti.

IV.

As to the blood-stained sheet, the counsel does not show how it is material to any issue in the case. It gives him an opportunity, as it gave him an opportunity during the trial, to indulge in condemnation of the defendant, when it proves and tends to prove nothing. It is difficult for this Court to conceive of the highly sensational manner in which this bloody sheet was carried in a triumphal procession from the safe of the United States Attorney to the court-room, exhibited in all its silent appeal to the jury for vengeance of a crime never committed, or attempted, or dreamt of, and the effect that this absolutely immaterial evidence had upon the minds of the jury and spectators.

When we remember that the evidence was not confined to the limited issue tendered by the indictment, but it was sought to show that the defendant was a moral monster, who ought to be crucified, and when it was sought to inflame the jury to such a degree that they should lose sight of the issue which they were to try, and so that they would be compelled by the pressure of public opinion assiduously manu-

factured to bring in a verdict of guilty without calmly considering the evidence on the issue they were trying, we can easily see how this evidence prejudiced the defendant. Mr. Roche does not explain why it was introduced, but tries to gloss it over as of no consequence. It was of great consequence in inculcating in the minds of the jury the belief that defendant should be punished on general principles.

ADDENDUM.

After this Reply Brief had been printed, we discovered the opinion of the Circuit Court of Appeals, on *rehearing*, in the case of Johnson v. U. S., published in 215 Fed. 684, 685. As it contains some remarks apposite to the case at bar upon the subject of misconduct of the prosecuting attorney as to the "blood stained sheet," we beg leave to refer to the same.

ADDENDUM.

The Circuit Court of Appeals, in the case of Johnson v. U. S. 215 Fed. 684, 685, when considering the case on *rehearing*, said, of a situation and act of misconduct on the part of the prosecuting attorney similar to that which took place as to the "blood-stained sheet" in the case at bar:

"In his opening statement the government's attorney said:

'Another immoral purpose is one too obscene to mention, the purpose being for defendant to compel these women to commit the crime against nature upon his body. We will demonstrate that beyond any reasonable doubt to you, gentlemen, before the close of this case.'

We must assume that the government's attorney, when he made the statement, believed he could produce the evidence. But at some time before he closed he knew that the picture he had drawn of the negro pugilist could not be verified. Yet not until after defendant's attorney had made a motion to that effect after the close of the government's case were the crime against nature counts withdrawn from the consideration of the jury. *A desire, if not a duty, to be fair should have led the government's attorney to withdraw that heinous charge the MOMENT he knew it could not be substantiated."*

In the case at bar, it is not so much what the government's attorney said, as what he did. His act, in exhibiting the "blood-stained

sheet" to the jury and permitting the impression insidiously to creep into their minds that the sheet exhibited mute but horrible evidence of the violation of the virginity of the Norris girl by Caminetti, spoke more forcibly and prejudicially than words.

Even the learned trial Judge became imbued with the same horrible idea, for when the testimony was brought out by Mr. Roche that the sheet was soiled, he said: "The Court: When you say 'soiled' do you mean soiled with blood? A. Yes sir." (Transcript of Record, pp. 207-208. See also testimony fully set forth on pages 120-121 of our Opening Brief.)

It would be an insult to the intelligence and ability of the Government attorneys to assume that they had not fully interrogated Lola Norris before she ever went on the witness stand and knew, just as she testified, that the "blood-stained sheet" was not the mute and horrible evidence of any violation of her virginity but was just as she testified: "I first learned that I had become sick that night, when I arose in the morning. I took the night gown into the front room and told Miss Warrington to put it into the valise. She said it would be better to leave it there. That night gown was finally left in the front bedroom. I returned to the

rear bedroom that morning to complete putting on my wearing apparel. *I put one of the sheets into the closet. There was some discoloration.*" (Transcript of Record, p. 276. See also testimony fully set forth on pages 132-133 of our Opening Brief.)

The conduct of the Government attorney was not only most reprehensible but it was most cruel and inexcusable. As we have stated, if he knew anything about his case at all, he must have known the true state of facts relative to the "blood-stained sheet." If he did not know the true state of facts relative to the blood-stained sheet, he, as a public prosecutor, **SHOULD HAVE KNOWN THE TRUE STATE OF FACTS.** At any rate, the moment Lola Norris testified as to the "blood-stained sheet," he then knew of his terrible mistake and it should have been *his desire, if not alone his duty*, to withdraw or explain this heinous piece of evidence, "*the moment he knew it could not be substantiated.*" The language above quoted of the Circuit Court of Appeals in the Johnson case might well be paraphrased, to apply to the case at bar, as follows:

"We must assume that the Government's attorney, when he introduced the 'blood-

stained sheet,' believed it to be evidence of the violation of the virginity of Lola Norris. But at some time before he closed he knew that the picture he had drawn of the 'blood-stained sheet' could not be verified. Yet not until after the defendant had closed his case, in fact, after both prosecution and defendant had closed their case, was the 'blood-stained sheet' explained to the jury. *A desire, if not a duty, to be fair should have led the Government's attorney to withdraw or explain that heinous piece of evidence the MOMENT he knew it could not be substantiated."*

In the case at bar, the Government attorney did not withdraw or explain the heinous piece of evidence the MOMENT he heard the testimony of Lola Norris, nor did he withdraw or explain it before he closed the case for the prosecution. He made no attempt whatever to do anything to correct the horrible impression that jury and trial Judge and the attorneys for the defense all had received as to the purpose of offering in evidence the "blood-stained sheet" until the defense had rested and the evidence was all in and the case was about to go to the jury for argument.

Furthermore, as we have already seen, the "blood-stained sheet" was something that had

to do between Lola Norris and Caminetti, and the evidence shows that the defendant Diggs had nothing whatsoever to do with it, and yet it was permitted, over objection and exception, to be introduced in evidence in a prosecution against the defendant Diggs, and the horrible impression was permitted by the Government attorneys to creep into the minds of the trial Judge and jury that the "blood-stained sheet" was the silent but heinous evidence of the violation of a chaste young woman. Obviously, the object of the offering of such evidence was simply to inflame the minds of the jury. At all events, it was error and misconduct of the grossest character, and we respectfully submit that our views in this respect are fully supported by the expression of opinion, above quoted, declared in the case of *Johnson v. United States*, 215 Fed. Rep. 684, 685.

In another respect, the case of *Johnson v. United States*, 215 Fed. Rep. 684, 686, is applicable.

It will be recalled that the prosecuting attorneys attempted to show, and actually put questions to the defendant Diggs on cross examination, that Diggs had in the course of the trial and in the presence of the jury, during the cross examination of Miss Warrington, repeat-

edly suggested to his counsel questions to be propounded to Miss Warrington. Objection and exception was taken to this line of conduct, and it was assigned as error and misconduct and the trial Judge was asked to instruct the jury to disregard the misconduct of the prosecuting attorneys, to which he replied: "I will instruct the jury at the proper time for instructing them." (Transcript of Record, pp. 355-357.) It is to be noted that the trial Court absolutely failed to instruct the jury at any time as requested by counsel for the defendant or when delivering his charge to the jury. In fact, he permitted the Government attorneys to argue to the jury: (Mr. Sullivan): "*Counsel for the defense, prompted by the defendant, put these questions to Marsha Warrington.*" (Transcript of Record, pp. 368-369.)

The Circuit Court of Appeals, in the Johnson case, in speaking on page 686 of Volume 215 of the Federal Reporter, of certain questions asked of the defendant Johnson on cross examination, used the following language, which we deem, on principle, applicable to the situation above referred to in the case at bar:

"A cross-examiner, for the purpose of stand from his own admissions, may go showing the character of the party on the

into collateral matters, but he is bound by the answers he obtains. What becomes of the rule if the cross-examiner, after obtaining a direct answer, is permitted to persist in repeating insinuating questions with the obvious object of having his innuendoes taken in preference to the sworn answer? If this negro pugilist had admitted that he had 'beaten up' white women he might well have been characterized as a 'brute.' The last four questions, and many of the others, were of the most pernicious type.

These matters might not of themselves lead to a reversal. *They have been given to show the atmosphere of prejudice that pervades the record. They afford the setting in which must be viewed an erroneous admission of evidence.* One witness was called on rebuttal. He was asked:

'Q. State the conversation you had on Christmas Eve, 1910, with defendant respecting Etta.

'A. He asked me to go to the hospital with him to call upon her. He told me he had had a fight with her at Bob Mott's Cafe on State Street.'

The giving of this testimony was duly objected to. We find nothing in the record to justify the injection into the case of the collateral question whether defendant exercised his fighting abilities upon women.

When the situation thus improperly created is measured against the doubtfully sustainable prostitution counts, we are all convinced that defendant did not have a fair trial of that issue."

V.

As the other points discussed by Mr. Roche are fully discussed in our Opening Brief, we shall not discuss them here.

Respectfully submitted,

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